June 12, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing on behalf of Page Garbee-Kim, a recent graduate of our law school, who has applied for a clerkship with you. Page received an A- in my course in Employment Discrimination. She was an active and effective participant in our class discussions and she has an exemplary record in law school. I am happy to recommend her to you.

Employment Discrimination is a demanding course, at several different levels. The burden of proof on a variety of issues is decisive in many cases. This introduces a degree of doctrinal complexity into the course. It also raises practical problems for attorneys bringing or defending against claims of employment discrimination. In close cases, everything turns on who has the burden of proof and what it requires. As a matter of principle, the course addresses the many different meanings of equal opportunity and how it can be implemented through the law. Page did quite well in navigating these different issues, both abstract and concrete in the course. She was also a lively and welcome presence in our class discussions.

Page has been very active in the life of the law school. She was the submissions editor on the Virginia Journal of International Law and served in a variety of other student organizations. She currently practices law as a litigation associate at the Venable firm in Washington, D.C. She expects to continue her career in litigation and she sees a clerkship as a valuable learning experience, where she can see first hand how cases are litigated and how decisions are made.

Just as a clerkship would contribute to her career plans, she would be a valuable addition to any judge's chambers. She met the disruptions to legal education caused by the pandemic with poise and equanimity, adjusting well to the remote learning and social distancing that has dominated the law school experience during her time in law school. Based on this experience, I believe she is well suited to meet the challenges of a clerkship. She has the intellectual and personal qualities to be an excellent law clerk and I strongly recommend her to you.

Very truly yours,

George Rutherglen
Distinguished Professor of Law
Earle K. Shawe Professor of Employment Law
University of Virginia School of Law
580 Massie Road Charlottesville, VA 22903-1738
PHONE: 434.924.7015
FAX: 434.924.7536
grutherglen@law.virginia.edu • www.law.virginia.edu

June 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to highly recommend Ms. Page Garbee-Kim, who has applied for a clerkship in your chambers. Ms. Garbee-Kim possesses the excellent analytical, research and writing skills as well as the professionalism and drive that will make her a great law clerk for any judge who is fortunate enough to hire her.
I have had the privilege of getting to know Ms. Garbee-Kim in two courses at the University of Virginia School of Law. I first met Ms. Garbee-Kim when she took my seminar titled Law, Education and Inequality in the fall of 2019. The seminar analyzes how law and policy contributes to opportunity and achievement gaps in education and explores potential avenues for remedying these gaps and strengthening democracy. Ms. Garbee-Kim also took my spring 2022 Education Law Survey course, which provides an overview of a wide variety of education law issues, such as school desegregation, school funding, and school choice. Through these courses, I have had the opportunity to get to know Ms. Garbee-Kim well.

Throughout both courses, Ms. Garbee-Kim consistently offered insightful comments that built upon not only the reading, but also her own experiences as both a former teacher in a charter school in Washington, D.C. and someone who grew up with limited opportunities in a small town. Her perspective and the experiences that she shared in my courses deepened the understanding of her classmates and me regarding the topics that we studied. Ms. Garbee-Kim was always a professional, mature and engaged student who persuasively presented her thoughts on the course topics. In addition to her strong performance in my courses, Ms. Garbee-Kim distinguished herself amidst her many talented peers at the University of Virginia School of Law. She served as a 2L Senator for the Student Bar Association and earned a place on the Executive Board of the Virginia Journal of International Law while contributing to the community through volunteer work for such organizations as Virginia Law Women and Lamda Law Alliance.

My greatest insight into Ms. Garbee-Kim's potential to be an exceptional law clerk was through her paper for my seminar. She thoroughly synthesized social science researching regarding how inequity in testing accommodations is evident in the overrepresentation of affluent, white students and the underrepresentation of poor, minority students. Ms. Garbee-Kim summarized and critiqued how the statutes that govern how schools address disabilities contributes to these challenges and she examined the law and policy scholarly proposals for reform. She then offered a multifaceted law and policy approach for addressing these challenges that would combine amendments to federal disability law that would remove barriers to equitable accommodations and increases to federal data collection to reduce accommodations awarded through fraudulent means while minimizing barriers to entry for minority students. Ms. Garbee-Kim's paper demonstrated that she possesses outstanding research, analytical and writing skills. Her research on the twin weaknesses of this area of disability law was thorough and comprehensive and her writing regarding the relevant law and policy was clear and cogent. She presented her analysis and arguments in a well-organized and logical format. She earned an A on the paper. Her first-rate analytical, research and writing skills will greatly benefit and support the work of any judge. In addition, her ability to present her analyses and insights in a clear, cogent and persuasive manner will cause her to be a valuable contributor to discussions within chambers.

Ms. Garbee-Kim's upbringing in a small town (Lynchburg, Virginia) with limited opportunities provided her with very little exposure to the legal profession. Nevertheless, she started to dream of becoming a lawyer at the age of seven and began sharing this dream with those around her. This dream led her to major in political science at Syracuse University and graduate at nineteen, with the intention of taking a few years off before going to law school. Ms. Garbee-Kim then began working as a teacher in a Washington, DC Public Charter School and found her passion and purpose: to find legal solutions to educational inequality. She decided that she wanted to help others experience the same opportunity mobility that education had afforded her. At the University of Virginia Law School, Ms. Garbee-Kim focused her energy and attention on preparing for her career in education law and policy by not only excelling in my education law courses, but also by participating in the Child Advocacy Clinic and serving on the Executive Board of Street Law. Ms. Garbee-Kim's early graduation from college reveals that the focus and determination that she displayed in law school began at a young age. After law school, Ms. Garbee-Kim accepted a job at Venable, a law firm that represents the most independent schools in the nation. She currently works at the intersection of education, employment, and litigation. After serving as a law clerk, Ms. Garbee-Kim hopes to pursue a career in education law at the United States Department of Education.

I encourage you to interview Ms. Garbee-Kim so that you may witness her many positive qualities for yourself. Please do not hesitate to contact me if I may provide more information about her. I may be reached at krobinson@law.virginia.edu or 404-308-6821 (cell).

Sincerely,

Kimberly Jenkins Robinson

Page Garbee-Kim

1622 5th Street N.W., Unit B Washington, DC 20001 | pag8gy@virginia.edu | (434) 660-6397

The attached writing sample is a Reply Memorandum of Law in Support of a Motion for Summary Judgment that I drafted for a pro bono case, *Tempey v. U.S. Dep't of Homeland Sec.*, Case No. 20-cv-5212 (ENV)(SJB), which is currently pending in the United States District Court for the Eastern District of New York. Since filing, it has been lightly edited for clarity and includes additional facts and law from a previous briefing for context. While I was supervised by a partner, Ian Volner, the writing sample contains minimal revisions and represents my own work.

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PRELIMINARY STATEMENT

The Department of Homeland Security ("DHS," "Defendant," or "Agency") invokes the deliberative process exemption to shield the identity of the individual(s) who may have embedded white-supremacist messaging in an official government press release (the "Press Release"). While DHS characterizes its actions as cooperative, Def.'s Reply at 1, the Agency omits and obscures several pertinent facts from the timeline, revealing that it has been delaying and obfuscating the release of statutorily mandated information.

Plaintiff submitted a Freedom of Information Act ("FOIA") request to DHS on August 9, 2018 (the "Request"). Tempey Decl. at ¶ 7; Def.'s 56.1 Stmt. at ¶ 5. Plaintiff's Request sought documentation, background material, messages, and correspondence related to the drafting of the Press Release. Tempey Decl. at ¶ 7; Def.'s 56.1 Stmt. at ¶ 6. Despite its statutory obligation to respond to FOIA requests within 20 working days, DHS did not provide a substantive response to Plaintiff's Request until nearly two years later. Tempey Decl. at ¶ 14; Def.'s 56.1 Stmt. at ¶ 10; 5 U.S.C. § 552(a)(6)(A)(i).

On March 27, 2020, James V.L.M. Holzer, Deputy Chief FOIA Officer for DHS, denied Plaintiff's Request. Tempey Decl. at ¶ 14; Def.'s 56.1 Stmt. at ¶ 10. In lieu of producing responsive materials to Plaintiff's Request, DHS referred Plaintiff to twenty-four pages of heavily redacted documents posted to DHS's website. *Id*. The Agency's final response took over 400 working days to process and failed to outline the reasons underlying the agency's response as the statute requires. *See* 5 U.S.C. § 552(a)(6)(A)(i)(I). After exhausting all applicable administrative remedies, Plaintiff brought this action on November 12, 2020, alleging that DHS failed to conduct a proper or sufficient search for records responsive to Plaintiff's Request in violation of its obligations under FOIA. Tempey Decl. at ¶¶ 15-16; Def.'s 56.1 Stmt. at ¶ 14. Thereafter, the

parties were able to negotiate an expanded search, and on March 16, 2022, DHS produced an additional 236 pages of documents. Tempey Decl. at ¶ 17; Def.'s 56.1 Stmt. at ¶¶ 16-17. However, DHS continues to shirk its obligations under FOIA. The vast majority of the pages provided are either duplicative and/or heavily redacted. DHS claims its redactions and withholdings are justified under Exemptions 5 and 6 of FOIA. *See* Vaughn Index; *see also* 5 U.S.C. § 552(b)(5)-(6). Critically, all draft versions of the Press Release are withheld in their entirety. March 16 Document Production, Bates Stamp Nos. DHS-001-02512-000004 through DHS-001-02512-000018; August 3 Document Production, Bates Stamp Nos. DHS-001-02512-000237 through DHS-001-02512-000245. As such, the documents fail to shed any light on the pertinent issues at hand, including the entire universe of people involved in the Press Release, the drafting history of the Press Release, or how DHS decided on the incendiary title of the Press Release.

Defendant's extensive redaction of these documents under broad claims of exemption pursuant to Exemptions 5 and 6 is a continued attempt by the Government to sidestep its FOIA obligations. The burden to justify its withholding lies with DHS, and it has failed to meet this burden. *Cook v. Nat'l Archives & Recs. Admin.*, 758 F.3d 168, 173 (2d Cir. 2014) (quotation marks and citation omitted). *See also* 5 U.S.C. § 552(a)(4)(B). Because courts should construe FOIA exemptions narrowly, and analyze facts and inferences in the light most favorable to the requester, Plaintiff's Cross-Motion for Summary Judgment should be granted, and Defendant's Motion should be denied. *Katzman v. Freeh*, 926 F. Supp. 316, 320 (E.D.N.Y. 1996) (citing *Becker v. IRS*, 34 F.3d 398, 405 (7th Cir. 1994)).

ARGUMENT

I. DHS IMPROPERLY APPLIED EXEMPTION 5.

A. DHS Has Not Satisfied Its Burden to Show That the Deliberative Process

Privilege Applies to Drafts of the Press Release.

DHS's application of Exemption 5 to drafts of the Press Release and other associated communications was improper because the Press Release conveys a prior agency decision and is therefore not deliberative. While documents reflecting judgment calls about how to convey an agency decision may be properly withheld, the exemption only applies to the "document that first communicates a policy decision." *Campaign Legal Ctr. v. U.S. DOJ*, 34 F.4th 14, 24 (D.C. Cir. 2022) (emphasis added). This is because this initial document may "shape[] and sharpen[] the underlying policy judgment or [] have direct consequences for ongoing agency programs and policies." *Id*. (citing *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 362-64 (D.C. Cir. 2021)). Here, as Defendant acknowledges, this Press Release was not the first document to communicate the Trump administration's plan to ensure border security. Def.'s Reply at 4 (discussing the issuance of Executive Order 13767). Nor was the Press Release the Agency's first communication on the matter. For example, on February 21, 2017, DHS issued a document "designed to answer some frequently asked questions about how the Department will operationally implement the guidance provided by [EO 13767]."[1] Defendant cannot claim that these documents reflect deliberation on "how to best relay to the public that the former administration, through DHS, intended to ensure border security and its reasons for favoring a border wall" when the public was already informed of the decision in the months and years prior. Def.'s Reply at 5. Therefore, the Press Release is an advocacy piece, created to "support a decision already made." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975)). As such, its drafts are not properly withheld under Exemption 5.

[1] DEP'T OF HOMELAND SEC., Q&A: DHS IMPLEMENTATION OF THE EXECUTIVE ORDER ON BORDER SECURITY AND IMMIGRATION ENFORCEMENT (2017).

Additionally, the deliberative process privilege protects documents only if they are *both* deliberative and pre-decisional. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (internal citations omitted). A document is pre-decisional if it is "generated before the adoption of an agency policy." *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Documents that simply "promulgate or implement an established policy of an agency" are not pre-decisional. *BuzzFeed, Inc. v. U.S. DOJ*, 419 F. Supp. 3d 69, 76 (D.D.C. 2019) (citing *Brinton v. U.S. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980)). Where an agency "hides a functionally final decision in draft form, the deliberative process privilege will not apply. After all, what matters is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." *Campaign Legal Ctr*, 34 F.4th at 24 (quoting *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786-88 (2021) (internal quotation marks and alterations omitted) (emphasis added).

The Agency's own language in its February 21, 2017 Q&A indicates it is hiding a functionally final decision as a draft. Specifically, DHS states that the Q&A provides guidance on how the Agency "will operationally implement [EO 13767]." This is a strong indicator that the Q&A, and the subsequent Press Release at issue, is implementing the border policy that was established years before. Therefore, drafts of the Press Release and associated communications are not pre-decisional and may not be withheld pursuant to Exemption 5. Defendant has failed to meet its burden to justify the withholding. *Cook*, 758 F.3d at 173; 5 U.S.C. § 552(a)(4)(B).

B. DHS Has Not Satisfied Its Burden to Show That the Deliberative Process Privilege Applies to Documents Post-Dating the Issuance of the Press Release.

Defendant's justification for withholding the documents created after the issuance of the Press Release is similarly unpersuasive. While Exemption 5 may apply to communications regarding an agency's potential response, the agency must establish a link to a document that is

both pre-decisional and deliberative for the Exemption to apply. *See Grand Cent. P'ship, Inc.*, 166 F.3d at 482 (holding Exemption 5 "does not protect a document which is merely peripheral to actual policy formation"). Without this limitation, agencies would be permitted to withhold swaths of information by tying it to any decision, no matter how insignificant, creating the "overuse" of Exemption 5 that Congress viewed as a particular threat. *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 105 (D.D.C. 2019) (quoting H.R. REP. NO. 114-391, at 10 (2016)). Because the Press Release underlying the discussions is neither deliberative nor pre-decisional, the Court should reject the Defendant's application of Exemption 5 to documents post-dating the Press Release.

C. DHS Has Failed to Comply with FOIA's Segregability Requirement.

The Agency's failure to segregate portions of the record is also a violation of its obligations under FOIA. While DHS claims that it need not disclose factual information that is "inextricably intertwined," Def.'s Reply at 10, "[i]t is only in exceptional circumstances that 'disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted.'" *BuzzFeed*, 419 F. Supp. 3d at 77 (emphasis added) (quoting *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)). This circumstance is not exceptional. As explained in Section I.A, the agency's choice of facts does not reveal the deliberative process because the policy decision was set in stone in the months and years prior. As such, the Defendant failed to disclose reasonably segregable portions of the record and did not discharge its obligations under FOIA. *See* 5 U.S.C. § 552(b)(9).

II. WHILE PLAINTIFF OPTED FOR LESSER INFORMATION, THERE IS NO PRIVACY INTEREST IN THE NAMES AND TITLES OF GOVERNMENT EMPLOYEES UNDER EXEMPTION 6.

Defendant's withholding of the names and titles of staff members involved in drafting the Press Release is also improper. There is no privacy interest in the names or job titles of government

employees, even at the staff level. *See Leadership Conf. on C. R. v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding no privacy interest in the names and telephone numbers of DOJ paralegals under Exemption 6, because "[a] name and work telephone number is not personal or intimate information… that normally would be considered protected information under Exemption 6."). Exemption 6 does not categorically exempt individuals' identities, as the privacy interest at stake varies depending on the context in which it is asserted. *Am. Oversight v. U.S. Gen. Sers. Admin.*, 311 F. Supp. 3d 327, 346 (D.D.C. 2018). Rather, the Exemption 6 analysis requires balancing the privacy interests in nondisclosure against the public interest in disclosure. *Id*. at 345. "[U]nless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail." *Id*. Here, the public interest outweighs the privacy interests because Defendant's harm is speculative. Additionally, the release of the employees' names, titles, and positions is in the public interest given the stakes and demonstrated public outcry and concern.

Defendant's speculative harm to a privacy interest is not sufficient to warrant nondisclosure under FOIA Exemption 6. *Jud. Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 142 (D.D.C. 2014) (holding the potential adverse consequences of disclosure must be real rather than speculative, and a bare assertion that a document's disclosure would constitute a clearly unwarranted invasion of an individual's personal privacy insufficient). Defendant's claims of the potential for "invasive harassment," without more, is not sufficient. Def.'s Reply at 8.

Additionally, the inclusion of a white-supremacist dog whistle in a DHS press release is serious, and the public has a genuine interest in the disclosure of the person(s) who were involved in the Press Release. In particular, the public has a heightened interest in the identities of the staff members who requested or provided information that was later used in the Press Release and were clearly involved in its drafting. *Compare* Vaughn Index, Bates Stamp Nos. DHS-001-02512-

000001 through DHS-001-02512-000003 ("The number of credible fear screening referrals has risen from fewer than 5,100 in 2008 to nearly 92,000 screenings in 2016 – a 1,700 percent increase.") *with* Press Release ("There has been a 1,700 percent increase in Credible Fear receipts from 2008 to 2016."). Despite Defendant's assertions to the contrary, disclosure of these names, as well as their positions and titles, would clearly "further the public's understanding of DHS's operations and activities" as it pertains to the drafting and response to the Press Release. Def.'s Reply at 10. *See also Osen LLC v. U.S. Cent. Command*, No. 18-cv-6069, 2019 WL 4805805, at *5 (S.D.N.Y. Sept. 30, 2019). As such, Plaintiff is entitled to the names of the employees, although initially opted to request the mere job titles of the relevant employees as a lesser request for information.

III. DHS HAS FAILED TO IDENTIFY A FORESEEABLE HARM, AS REQUIRED BY THE FOIA IMPROVEMENT ACT.

To satisfy its burden under the FOIA Improvement Act, the Agency must show that disclosure of the requested information would foreseeably harm a protected interest or that disclosure is prohibited by law; otherwise, it must disclose the information, even if the information falls within one of the FOIA exemptions. 5 U.S.C. § 552(a)(8)(A). Applicability of a FOIA exemption is still necessary—but no longer sufficient—for an agency to withhold the requested information. *Seife v. FDA*, 43 F.4th 231, 235 (2d Cir. 2022). Defendant's Reply continues to offer generalized, speculative assertions regarding the harm that disclosure will bring, which is insufficient to overcome its burden. *Jud. Watch, Inc. v. U.S. Dep't of Com.*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (speculation about potential harm and boilerplate justifications are insufficient); *Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020) (an agency's burden cannot be satisfied with "generalized assertions").

Defendant asserts that the redactions were necessary to protect its interest in candor among

employees. However, where a protected interest under Exemption 5 conflicts with a competing public interest, such as alleged government malfeasance, the exemption should be denied. *Tummino v. Von Eschenbach*, No. CV 05-366 (ERK)(VVP), 2006 U.S. Dist. LEXIS 81286, at *26-30 (E.D.N.Y. Nov. 6, 2006). Defendant's Reply does not contain any justification for why its interest in candor outweighs the competing interest of uncovering agency malfeasance. While Defendant attempts to characterize the public interest as a "purely speculative smoking gun," Def.'s Reply at 2, this characterization minimizes the disturbing nature of the headline and its striking similarities to white-supremacist propaganda. Additionally, the Agency's argument is circular. It claims there is nothing of note within the documents, and therefore, disclosure is unwarranted. If so, then the Agency proves Plaintiff's point that the government's interest is minimal.

Thus, even assuming *arguendo* that the exemptions claimed were sound (they are not), the deliberative process exemption should be denied because there is no foreseeable harm in the release of the documents. Furthermore, the Agency's public confusion rationale is defunct as a matter of law because withholding due to risk of misinformation is "condescending and at odds with the spirit of the FOIA." *W. Chi. v. U.S. Nuclear Regul. Comm'n*, 547 F. Supp. 740, 748 (N.D. Ill. 1982). Therefore, none of the reasons offered by Defendant are persuasive, and Defendant fails to meet its burden under the FOIA Improvement Act.

CONCLUSION

At its most basic level, the Freedom of Information Act safeguards the public's First Amendment right to know what decisions the government has made in its name and why it has made them. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). FOIA's deliberative process exemption allows the Government to serve the American public, free from interference, by limiting public disclosure. However, that protection ends when the deliberative process ends

and cannot justify suppression of information about the underpinnings of a settled policy determination, which the government seeks to defend on controversial terms. For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Cross-Motion for Summary Judgment and deny Defendant's Motion.

Applicant Details

First Name	**Sherry**
Middle Initial	**N**
Last Name	**Glover**
Citizenship Status	**U. S. Citizen**
Email Address	**sherrynicoleglover@gmail.com**
Address	**Address** Street **777 S 3rd St** City **Harrison** State/Territory **New Jersey** Zip **07029** Country **United States**
Contact Phone Number	**(786) 419-9293**

Applicant Education

BA/BS From	**University of Florida**
Date of BA/BS	**May 2016**
JD/LLB From	**University of Florida Fredric G. Levin College of Law** **https://www.law.ufl.edu/careers**
Date of JD/LLB	**May 15, 2019**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Frederick Douglas Moot Court Competition**

Bar Admission

Admission(s)	**Other, New York**

Other Bar Admission(s)	**United States District Court for the Southern and Eastern Districts of New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Emerson, Robert
robert.emerson@warrington.ufl.edu
Roberts, Thomas
thomasroberts1@gmail.com
(267) 242-8178

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SHERRY N. GLOVER

777 S 3rd St. Apt. 3110 Harrison, NJ 07029 ♦ sherrynicoleglover@gmail.com ♦ (786) 419-9293

May 19, 2023

By OSCAR
Honorable Kiyo A. Matsumoto
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I am an attorney with 3.5 years of federal litigation experience. I write to apply for a clerkship position for the 2025-2026 term.

I have significant writing and oral advocacy experience. As a former General Litigation Attorney for the City of New York, I have handled a broad range of civil matters – from the initial pleading and discovery stages to dispositive motion practice and settlement. I have also litigated multiparty disputes and appeals. In a federal district court matter, for example, I briefed and argued an appeal of a New York State administrative decision. I further oversaw the division's strategy for over twenty cases concerning civil rights at a City jail. These representations required careful assessment of claims, review and organization of records, strategy development, adaptability, consideration of agencies' unique interests, and substantial briefing of complex statutory and legal issues. I thus carry the requisite sound judgment, strong legal writing, and analytical skills to assist the Court with its decision-making, orders and opinions, and docket management. Notably, the New York City Law Department awarded me "Legal Rookie of the Year," which is a distinction for first-year attorneys who demonstrate outstanding performance. I will employ similar work-ethic and deliver high-caliber work product as a judicial clerk.

A clerkship at this juncture of my career would serve several purposes. First, I enjoy challenging research and writing assignments. I desire to transition from persuasive written advocacy to objective writing. Second, as an aspiring judge, I seek insight into the innerworkings of the Court and exposure to diverse practice areas and industries. A clerkship would provide these opportunities.

Additionally, I am interested in clerking for Your Honor because I seek mentorship navigating the legal profession as a minority attorney and I similarly plan to pursue a career in federal prosecution. I seek to learn from Your Honor's experience.

Thank you for your time and consideration.

Respectfully Yours,

/s/ Sherry N. Glover
Sherry N. Glover, Esq.

SHERRY N. GLOVER

777 S 3rd St. Apt. 3110 Harrison, NJ 07029 ♦ sherrynicoleglover@gmail.com ♦ (786) 419-9293

EDUCATION

University of Florida Levin College of Law Gainesville, FL
Juris Doctor May 2019
Honors: Trial Practice Book Award; Prosecution Clinic Book Award; Trial Practice Teaching Assistant; Southern Regional Frederick Douglas Moot Court Competitor; Navigator Program Oral Advocate (argued case in federal court); Phelps Dunbar 1L Closing Argument Competition – Final Four

University of Florida College of Liberal Arts and Sciences Gainesville, FL
Bachelor of Arts, English and Philosophy, cum laude May 2016
Honors: J. Wayne Reitz Scholar (top 25 leaders); Benjamin A. Gilman International Scholar (merit-based study abroad scholarship); Harvard Kennedy School Public Policy & Leadership Conference; Constitutional Law Lecturer / Teaching Assistant

EXPERIENCE

Nicoletti Hornig & Sweeney New York, NY
Associate Attorney, Commercial Litigation and Admiralty Practices October 2022 – Present
Advise and represent multinational clients in complex civil litigation, commercial disputes and admiralty matters throughout state, federal and international courts. Opposed motion for preliminary injunction in matter involving partnership / joint venture dispute. Moved for default judgment based on breach of contract claims.

New York City Law Department, Office of the Corporation Counsel New York, NY
Assistant Corporation Counsel, General Litigation Division September 2019 – July 2022
Awards*:* Legal Rookie of the Year December 2020
Drafted substantive motions concerning constitutional law issues, civil rights, and employment disputes, most of which resulted in favorable Court decisions. Moved for summary judgment in a class action raising challenges to tenure regulations for teachers. Settled constitutional challenges to the City's nuisance abatement regulation in a federal class action. Oversaw the division's litigation strategy for over 20 S.D.N.Y. cases alleging civil rights issues at a City jail. Negotiated settlements of matters under the Individuals with Disabilities Education Act (IDEA) and Americans with Disabilities Act (ADA). Deposed 4 witnesses in a multiparty action raising medical malpractice and IDEA and ADA violations at a private school. Moved to intervene in a New York Freedom of Information Law (FOIL) action, and developed strategy that balanced the divergent interests of 5 City agencies in a separate FOIL matter presenting complex and novel issues. Mentored summer interns.

U.S. Department of Justice Washington, DC
Summer Law Intern Program (SLIP), Tax Division –Appellate and Civil Trials Sections May 2018 – August 2018
Composed pleadings for federal district, tax, and bankruptcy courts. Drafted appellate brief on claims of fraud on the court and commercial liens. Prepared memoranda on asset liquidation and I.R.C. provisions.

University of Florida Warrington College of Business Gainesville, FL
Research Assistant to Professor Robert Emerson June 2017 – May 2018
Wrote sections of articles on evidentiary matters and business franchises. Reviewed articles, verified citations therein, and proposed edits in preparation for submission to professional law journals.

U.S. District Court for the Southern District of Florida Miami, FL
Judicial Intern to the Honorable Paul C. Huck June 2017 – August 2017
Drafted portions of orders and opinions during Judge Huck's seat by designation on the U.S. Court of Appeals for the Ninth and Eleventh Circuits. Observed multiple trials, sentencing hearings, and other court proceedings.

INTERESTS AND BAR ASSOCIATIONS

Membership: Federal Bar Council – First Decade Committee
Interests: International "solo" travel, theatre / performing arts, youth mentorship

UNIVERSITY OF FLORIDA

Official Academic Transcript

Office of the University Registrar
22 [illegible] Hall, Box 114[illegible]00
Gainesville, FL 32611-4[illegible]00
www.ufl.edu
www.registrar.ufl.edu
352-3[illegible]2-137

Do Not Release to Third Party Without Student Permission

Name: Sherry N Glover
Social Security Number: XXX-XX-2820
UFID: 6994-3398
Date of Birth: November 22
Basis of Admission: Beginning Freshman
Residency Status: Florida Resident/Tuition (F)

This transcript is not valid without the university seal and signature of the University Registrar

Stephen J. Pritz Jr.
University Registrar

Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried

Begin Undergraduate and/or Certificate Transcript

Communication & Computation complete

Programs Pursued

College: The College of Liberal Arts and Sciences
Degree Sought: Bachelor of Arts
Major: English

College: The College of Liberal Arts and Sciences
Degree Sought: Bachelor of Arts
Major: Philosophy

Summer 2012 — **Credit by Exam**

Advanced Placement

AMH 2010	United States to 1877		P	3.00	3.00	0.00
AMH 2020	US Since 1877		P	3.00	3.00	0.00
AML 2070	Survey of Am Lit	R	P	3.00	0.00	0.00
POS 2041	American Federal Govt		P	3.00	3.00	0.00
		Grade Points: 0.00		Earned Hours: 9.00		Hours Carried: 0.00

Summer 2012 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework
Session: July-August 6 Weeks

MAC 1105	Basic College Algebra	B	3.00	3.00	3.00
SLS 1102	Enhanc Freshman Exper	A	1.00	1.00	1.00
SYG 2010	Social Problems	A	3.00	3.00	3.00
	Grade Points: 25.00		Earned Hours: 7.00		Hours Carried: 7.00

Fall 2012 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AML 2070	Survey of Am Lit	A-	3.00	3.00	3.00
HUM 2305	What Is the Good Life	A	3.00	3.00	3.00
JOU 1001	Intro to Journalism	B+	1.00	1.00	1.00
PSY 2012	General Psychology	B	3.00	3.00	3.00
TPP 2100	Acting for Non-Majors	A	3.00	3.00	3.00
	Grade Points: 47.34		Earned Hours: 13.00		Hours Carried: 13.00

Spring 2013 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AEC 4465	Global Leadership	A	3.00	3.00	3.00
ENG 2300	Film Analysis	A	4.00	4.00	4.00

Undergraduate: Page 1 of 3 Career: 1 of 2 — Date Printed: September 29, 2021 — Copies Requested: 1

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Name: Sherry N Glover
Social Security Number: XXX-XX-2820
UFID: 6994-3398
Date of Birth: November 22
Basis of Admission: Beginning Freshman
Residency Status: Florida Resident/Tuition (F)

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Stephen J. Pritz Jr.
University Registrar

Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
GLY 1000	Exploring Geol Sci		B-	3.00	3.00	3.00
PHM 3202	Political Philosophy		A	3.00	3.00	3.00
SPC 2608	Intro Public Speaking		A	3.00	3.00	3.00
		Grade Points: 60.01		Earned Hours: 16.00		Hours Carried: 16.00

Fall 2013 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AFA 3930	Politics Of Blk Hair		A	3.00	3.00	3.00
AML 3607	African-Amer Lit 2		A-	3.00	3.00	3.00
AST 1002	Discover the Universe		C	3.00	3.00	3.00
AST 1022L	Astronomy Laboratory		A	1.00	1.00	1.00
FOS 2001	Mans Food		A	3.00	3.00	3.00
PHI 3650	Moral Philosophy		A	3.00	3.00	3.00
		Grade Points: 57.01		Earned Hours: 16.00		Hours Carried: 16.00

Spring 2014 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AML 4453	Af Am Wom & Cul Crit		A-	3.00	3.00	3.00
CCJ 4934	Scctraining		A	3.00	3.00	3.00
PHI 3130	Symbolic Logic		C+	3.00	3.00	3.00
POS 3606	Amer Civil Liberties		B	3.00	3.00	3.00
WIS 2040	Wildlife Issues		A	3.00	3.00	3.00
		Grade Points: 51.00		Earned Hours: 15.00		Hours Carried: 15.00

Summer 2014 — **Transfer Credit from Univ Nevada Reno***
Study Abroad in England UF approved study abroad program
Total Hours Received: 6.00

Fall 2014 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AML 3605	African-Amer Lit 1		B+	3.00	3.00	3.00
LAT 1120	Beginning Latin 1		B	4.00	4.00	4.00
PHI 3930	Philos Of Education		A-	3.00	3.00	3.00
PHM 3123	Feminism		A	3.00	3.00	3.00
POS 3603	Am Constitutional Law		A	3.00	3.00	3.00
		Grade Points: 57.00		Earned Hours: 16.00		Hours Carried: 16.00

Spring 2015 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AML 4685	Women Wrtng Abt Race		A	3.00	3.00	3.00

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University Registrar

Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
LAT 1121	Beginning Latin 2		C+	3.00	3.00	3.00
PHH 3100	Ancient Greek Philos		B-	3.00	3.00	3.00
PHI 3300	Theory of Knowledge		B+	3.00	3.00	3.00
POS 4624	Race Law & Constit		A	3.00	3.00	3.00
		Grade Points: 48.99		Earned Hours: 15.00		Hours Carried: 15.00

Fall 2015 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

IDH 4905	Hnr Reitz Scholars		A	1.00	1.00	1.00
LAT 1104	Beginning Latin 3		S	3.00	3.00	0.00
LIT 4333	Lit for Adolescent		B	3.00	3.00	3.00
PHH 3400	Modern Philosophy		C	3.00	3.00	3.00
PHH 4930	Seminar On Nietzsche		A	3.00	3.00	3.00
PHI 3693	Ethics of Communica		A	3.00	3.00	3.00
POS 4905	Individual Work		A	3.00	3.00	3.00
		Grade Points: 55.00		Earned Hours: 19.00		Hours Carried: 16.00

Spring 2016 — **University of Florida** — **Undergraduate**
The College of Liberal Arts and Sciences

Enrolled Coursework

AML 4685	World Of J. Baldwin		A	3.00	3.00	3.00
IDH 4905	Hnr Reitz Scholars		A	1.00	1.00	1.00
LIT 4331	Childrens Literature		A	3.00	3.00	3.00
LIT 4332	Lit for Young Child		A	3.00	3.00	3.00
PHH 4930	Beauvoir & Sartre		A	3.00	3.00	3.00
		Grade Points: 52.00		Earned Hours: 13.00		Hours Carried: 13.00

Degrees Awarded

Awarded Bachelor of Arts
Graduated May 3, 2016
Cum Laude
Major English
Cum Laude
Major Philosophy

Cumulative GPA: 3.56	Grade Points: 453.35	Earned Hours: 145.00	Hours Carried: 127.00

UF CUM Undergraduate GPA: 3.56 **UF CUM Grade Points:** 453.35 **UF CUM Hours Carried:** 127.00
Total Hours: 145.00 **UF Earned Hours:** 139.00 **Transfer Hours:** 6.00

End of Undergraduate and/or Certificate Transcript

Undergraduate: Page 3 of 3 Career: 1 of 2 Date Printed: September 29, 2021 Copies Requested: 1

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Basis of Admission: Beginning Freshman
Residency Status: Florida Resident/Tuition (F)

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University Registrar

Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
	Begin Law Transcript					
Programs Pursued						
College:	The Fredric G. Levin College of Law					
Degree Sought:	Juris Doctor					
Major:	Law					
Fall 2016	**University of Florida The Fredric G. Levin College of Law**					**Professional Year 1**
Enrolled Coursework						
LAW 5100	Criminal Law		B+	3.00	3.00	3.00
LAW 5501	Constitutional Law		A-	4.00	4.00	4.00
LAW 5700	Torts		B+	4.00	4.00	4.00
LAW 5755	Intro to Lawyering		B	2.00	2.00	2.00
LAW 5792	Legal Writing		B	2.00	2.00	2.00
		Grade Points: 49.99		Earned Hours: 15.00		Hours Carried: 15.00
Spring 2017	**University of Florida The Fredric G. Levin College of Law**					**Professional Year 1**
Enrolled Coursework						
LAW 5000	Contracts		C+	4.00	4.00	4.00
LAW 5301	Civil Procedure		B	4.00	4.00	4.00
LAW 5400	Property		B	4.00	4.00	4.00
LAW 5793	Appellate Advocacy		B+	2.00	2.00	2.00
LAW 5803	Legal Research		A-	1.00	1.00	1.00
		Grade Points: 43.65		Earned Hours: 15.00		Hours Carried: 15.00
Summer 2017	**University of Florida The Fredric G. Levin College of Law**					**Professional Year 2**
Enrolled Coursework						
Session: May-August 12 Weeks						
LAW 6946	Externship		S	6.00	6.00	0.00
		Grade Points: 0.00		Earned Hours: 6.00		Hours Carried: 0.00
Fall 2017	**University of Florida The Fredric G. Levin College of Law**					**Professional Year 2**
Enrolled Coursework						
LAW 6063	Corporations		B-	3.00	3.00	3.00
LAW 6112	Adversary System		B+	3.00	3.00	3.00
LAW 6600	Income Taxation		B-	4.00	4.00	4.00
LAW 6936	Class Actions		B+	2.00	2.00	2.00
		Grade Points: 35.34		Earned Hours: 12.00		Hours Carried: 12.00

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Date of Birth: November 22
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Stephen J. Pritz Jr.
University Registrar

Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
Spring 2018		**University of Florida** **The Fredric G. Levin College of Law**				**Professional Year 2**
Enrolled Coursework						
LAW 6330	Evidence		B	4.00	4.00	4.00
LAW 6363	Trial Practice		S+	4.00	4.00	0.00
LAW 6511	First Amendment Law		B-	3.00	3.00	3.00
LAW 6750	Profess Responsibilty		C+	3.00	3.00	3.00
LAW 6807	Legal Drafting		B+	2.00	2.00	2.00
		Grade Points: 33.66		Earned Hours: 16.00		Hours Carried: 12.00
Summer 2018		**University of Florida** **The Fredric G. Levin College of Law**				**Professional Year 3**
Enrolled Coursework						
Session: May-August 12 Weeks						
LAW 6051	Secured Trans Pers Pr		C+	3.00	3.00	3.00
		Grade Points: 6.99		Earned Hours: 3.00		Hours Carried: 3.00
Fall 2018		**University of Florida** **The Fredric G. Levin College of Law**				**Professional Year 3**
Enrolled Coursework						
LAW 6367	Adv Trial Practice		S	1.00	1.00	0.00
LAW 6524	Statutory Interpr		C+	2.00	2.00	2.00
LAW 6930	Federal Courts		B	2.00	2.00	2.00
LAW 6942	Crim Clin- Prosecutor		S	6.00	6.00	0.00
LAW 6942	Criminal Prosec Lab		A	3.00	3.00	3.00
		Grade Points: 22.66		Earned Hours: 14.00		Hours Carried: 7.00
Spring 2019		**University of Florida** **The Fredric G. Levin College of Law**				**Professional Year 3**
Enrolled Coursework						
LAW 6111	Police & Police Prac		B	3.00	3.00	3.00
LAW 6367	Adv Trial Practice		S	1.00	1.00	0.00
LAW 6930	Florida Bar Topics		A-	2.00	2.00	2.00
LAW 6930	Trusts & Estates		B-	4.00	4.00	4.00
LAW 6930	Multistate Bar Topics		B	2.00	2.00	2.00
		Grade Points: 33.02		Earned Hours: 12.00		Hours Carried: 11.00

Degrees Awarded

Awarded Juris Doctor
Graduated May 17, 2019
Major Law

Date Printed: September 29, 2021
Copies Requested: 1

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Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried

Cumulative GPA: 3.00 Grade Points: 225.31 Earned Hours: 93.00 Hours Carried: 75.00

UF CUM Law GPA: 3.00
Total Hours: 93.00

UF CUM Grade Points: 225.31
UF Earned Hours: 93.00

UF CUM Hours Carried: 75.00
Transfer Hours: 0.00

End of Law Transcript
End of Official Transcript

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Graduate Programs in Business
Warrington College of Business Administration
Department of Management

201 Stuzin Hall
PO Box 117165
Gainesville, FL 32611-7165
352-392-0163

February 25, 2023

Re: Sherry N. Glover

Dear Judge:

This letter is to recommend the selection of Sherry N. Glover as your law clerk. From May 2017 to December 2017, I retained Sherry as my research assistant for franchise and comparative law topics involving franchise law and civil procedure as well as a teaching assistant for undergraduate classes on business law. I knew from her record, from interviewing her, and from her law school references that Sherry is a highly intelligent, hard-working law student whose writing skills, research acumen, and maturity would stand her in good stead as my research aide. So I was delighted to be able to hire her, as I knew others would also want her help, whether in an academic environment or in a law office.

My undergraduate Business Law course is a comprehensive legal environment of business course covering numerous subjects such as the courts, lawyers, contracts, intellectual property, torts, corporations, comparative law, partnerships, litigation, the Uniform Commercial Code, agency, employment law, and other topics. Sherry's fast turn-around in terms of drafting test questions was excellent. The students often are very demanding, but with Sherry's help I knew that her draft questions and other work would be on the mark –thorough, just, critical without being pedantic.

As both a teaching assistant and a research aide, Sherry's work was thorough, well-organized, and quite thoughtful, with Sherry continuing to grow as a legal professional and a scholar. Her warm personality, capacity for hard work, and eagerness to help others will serve her extremely well in a judicial clerkship and then wherever she goes in her legal career. She is an interesting person who would be not just an excellent assistant, but also – I believe – a model of what is wanted in a law clerk – smart, hard-working, holding excellent research and writing skills, respectful but – if and when called for – ready to bounce ideas and show initiative.

Sherry's character and experience indicate that she brings to a law career strong leadership potential. She has the acumen, self-discipline, and confidence to thrive in any academic or job setting. I know that Sherry will, as she has in the past, make the best of her opportunities. I believe that your judicial chambers will be the richer for having her work and her presence.

Please feel free to contact me.

Sincerely,

Robert Emerson

Robert W. Emerson
Hubert Hurst Professor of Business Law
Member of Maryland Bar
Harvard Law School, J.D., 1982
Advisory Editor-in-Chief, American Business Law Journal

The Foundation for The Gator Nation
An Equal Opportunity Institution

THOMAS B. ROBERTS
35 Prospect Park West, Apt 5A
Brooklyn, NY 11215
thomasroberts1@gmail.com
(267) 242 8178

June 2, 2023

Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Sherry N. Glover's Clerkship Application

Dear Kiyo:

I am writing to enthusiastically recommend that you hire Sherry Glover as a law clerk for your 2025 – 2026 opening. Sherry has the emotional, intellectual, and writing skills to be a superior law clerk and should be given the most serious consideration.

Sherry joined the New York City Law Department in September 2019 directly from law school. I was her direct supervisor in the Corporation Counsel's General Litigation Division until November 2020, when I retired after practicing law for 41 years. In the early 1990s I was also the direct supervisor of now Chief Judge Brodie when she came to the Corporation Counsel's office from law school. In many years of supervising young attorneys, Chief Judge Brodie and Sherry Glover stand out. They both received the Rookie of the Year award from the Corporation Counsel at the end of their first year of practice upon my strong recommendation.

Sherry is one of the most stable and mature young attorneys I have supervised. She came to New York from Miami by herself for the challenge and worked diligently on a wide variety of federal and state cases. Her emotional stability was particularly striking during the pandemic. Sherry had only been in New York for six months when she was effectively locked down by herself in New Jersey. The workload of the attorneys in the division grew dramatically due to the pandemic (the division's practice focuses on statutory and constitutional challenges to City policies and involves significant motion practice, which accelerated during the pandemic due to the suspension of trials). Sherry was routinely turning in 60-to-70-hour weeks. She surpassed me and many other attorneys in the division in that she never buckled, complained, or lost productivity in isolation. There will be no drama generated by Sherry during her clerkship. She is a conscientious professional and will be unflappable in dealings with counsel.

Intellectually, Sherry brings an insightful and thoughtful perspective to her work. The division's work includes significant constitutional cases and class actions, and Sherry quickly mastered the intricacies of the Federal Rules of Civil Procedure and civil rights litigation under

section 1983. As importantly, Sherry read the record of her cases with careful attention to detail and repeatedly won motions to dismiss by identifying a significant fact. She will read the memoranda and record of cases with skill and insight. She brings independent judgment to her work and has intellectual initiative. With more than three years of litigation experience, Sherry will provide your chambers a valuable perspective on the cases being decided.

Sherry writes concisely, directly, and clearly. I rarely had to make significant revisions to her papers, even during her first six months of work, and she always took my suggestions willingly and incorporated them into future work. She takes justified pride in her writing, which she always reviewed carefully before submitting for review. Her growth as an attorney was excellent.

Finally, I want to note that Sherry, like Chief Judge Brodie, is an African American woman with a commitment to fairness for all. One of the best things I did in my career was write letters of recommendation for Chief Judge Brodie that may have helped her take steps in her career beyond the Corporation Counsel's office. Sherry's potential is equally great, and she will go far.

Please give her application the most serious consideration.

Respectfully,

/S/

Tom

SHERRY N. GLOVER

777 S 3rd St. Apt. 3110 Harrison, NJ 07029 ♦ sherrynicoleglover@gmail.com ♦ (786) 419-9293

WRITING SAMPLE

The annexed writing sample is a Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint ("Motion"), dated June 10, 2022, which was filed in the United States District Court for the Southern District of New York. The matter stems from a New York State Family Court proceeding, in which the plaintiff was alleged to have neglected her minor child. Plaintiff brings claims of malicious prosecution, denial of substantive and procedural due process, interference with the right to intimate association, and negligence. This motion is in its pre-review stage – that is, it was not edited by others.

22 CV 773 (LJL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

V.A., on behalf of herself and her infant child, O.A.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, JEWISH BOARD OF FAMILY AND CHILDREN'S SERVICES, SCO FAMILY OF SERVICES, JEWISH CHILD CARE ASSOCIATION OF NEW YORK, and NAOMI CUDJOE,

Defendants.

CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

HON. SYLVIA HINDS-RADIX
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
New York, New York 10007

Of Counsel: Sherry N. Glover
Tel: (212) 356-0896

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TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Plaintiff V.A. commenced this action on behalf of her minor child, O.A., pursuant to 42 U.S.C. § 1983, against Defendants City of New York; Naomi Cudjoe, a former New York City Administration for Children Services ("ACS") employee (collectively, "City Defendants"); and three private entities – the Jewish Child Care Association of New York ("JCCA"), the Jewish Board of Family and Children Services ("JBFCS"), and SCO Family of Services. Plaintiff's claims stem from a Family Court proceeding, in which Plaintiff was alleged to have neglected O.A. by failing to provide him with psychiatric medication during an extended home visit or "vacation" from his then-foster care placement, JCCA Pleasantville. Plaintiff alleges that by Neglect Petition filed September 30, 2020, Defendant Cudjoe made false statements, which resulted in an unfair proceeding and four-month removal/remand of O.A. to ACS custody. Plaintiff contends that City Defendants engaged in malicious prosecution, denied her substantive and procedural due process, and interfered with her right to intimate association, thereby violating her constitutional rights. Plaintiff further alleges that all Defendants exercised negligence with respect to O.A.'s mental health treatment during his time in various foster placements, residential treatment facilities and community centers throughout a five-year period.

Plaintiff's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. First, Plaintiff fails to state a Fourteenth Amendment violation based upon the Neglect Petition. Indeed, ACS had a reasonable basis for its investigation and charges; ACS' conduct was not shocking, arbitrary, or egregious; and the temporary interruption of O.A.'s home visit was done pursuant to a Family Court Order. Second, Plaintiff fails to allege facts sufficient to support a claim of malicious prosecution because Plaintiff cannot demonstrate the lack of probable cause or that ACS acted with malice. Third, Defendant Cudjoe is entitled to qualified immunity. Fourth, Plaintiff fails to plausibly allege the existence of an

unconstitutional municipal custom or policy. Fifth, since Plaintiff's federal claims are not viable, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims of negligence. Accordingly, Plaintiff's Complaint should be dismissed and any discovery in this matter should be stayed pending Court determination of the instant motion.

STANDARD OF REVIEW

a. Federal Rule of Civil Procedure 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. "Although the Court must accept all allegations in the complaint as true, this tenet is inapplicable to legal conclusions." *Id.* Thus, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Additionally, if "a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true." *Poindexter v. EMI Record Group Inc.*, 11-CV-559, 2012 U.S. Dist. LEXIS 42174, at *2 (S.D.N.Y. March 27, 2012) (quoting *Barnum v. Millbrook Care Ltd. Partnership*, 850 F. Supp. 1227, 1232-33 (S.D.N.Y.1994)).

b. Documents the Court May Consider

While facts to consider in the context of a Rule 12 motion to dismiss are generally limited to those set forth in the pleadings, the Court may consider matters outside of the pleadings in certain circumstances, including: (i) documents attached to the complaint as exhibits or incorporated by reference therein; (ii) matters of which judicial notice may be taken; or (iii)

documents upon the terms and effect of which the complaint "relies heavily" and which are thus rendered "integral" to the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

Applying these principles, City Defendants respectfully refer the Court to the accompanying Declaration of Sherry N. Glover ("Glover Dec."), dated June 10, 2022, which contains copies of the following Family Court pleadings, orders and judgments under seal:

1. Petition for Approval of Instrument, dated September 23, 2016 (hereinafter "Voluntary Placement Agreement") at **Exhibit A**;
2. Court Approval of Disposition Order, dated November 21, 2016 at **Exhibit B**;
3. Neglect Petition, dated September 30, 2020 at **Exhibit C**;
4. Order Directing Temporary Removal of Child After a Petition is Filed, dated September 30, 2020 at **Exhibit D**;
5. Short Order, dated February 3, 2021 at **Exhibit E**;
6. Release Order After 1028 [Hearing], dated April 14, 2021 at **Exhibit F**; and
7. Order on Motion, dated May 20, 2021 at **Exhibit G**.

Not only are these documents integral to Plaintiff's claims and form the basis of Plaintiff's allegations, but there are explicit references to them in the Complaint. The Court may thus consider these documents in evaluating City Defendants' motion. *See In re Dayton*, 786 F. Supp. 2d 809, 814 (S.D.N.Y. 2011) (taking judicial notice of documents from family court proceedings submitted by the defendants); *Licorish-Davis v. Mitchell*, 12-CV-601 (ER), 2013 U.S. Dist. LEXIS 71917, at *1 n.2 (S.D.N.Y. May 20, 2013) (taking notice of filings in the underlying family court action because it "clearly relates to the present action," "Plaintiffs, as parties to the Family Court matter, have notice of the contents of the [relevant order]," and the "[o]rder is integral to Plaintiffs' claims").

STATEMENT OF FACTS

Voluntary Placement Agreement

By Complaint dated February 15, 2022 (Dkt. No. 3), Plaintiff alleges that her minor child, O.A., suffers a variety of mental health issues, including oppositional defiant disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, major depressive disorder, and bipolar disorder. Compl. ¶¶ 20, 45. By Voluntary Placement Agreement dated September 23, 2016, Plaintiff executed a written instrument with ACS pursuant to SSL 384-a, which voluntarily placed O.A. into the care and custody of ACS to address and improve his mental health issues. *Id.* ¶¶ 19, 20; Glover Dec., Exhibit A. By Court Approval of Disposition Order dated November 21, 2016, the Family Court approved the Voluntary Placement Agreement and issued an order placing O.A. into ACS' care. Compl. ¶ 28; Glover Dec., Exhibit B.

Plaintiff alleges that throughout a five-year period, O.A. was assigned to various foster placements, community residences (e.g., SCO Family of Services), and residential treatment facilities (e.g., JBFCS), with which Plaintiff contends ACS contracted, supervised, and monitored. Compl. ¶¶ 38-64. During this period, Plaintiff alleges that all Defendants failed to provide O.A. adequate mental health services and declined to honor Plaintiff's request for alternative mental health services (i.e., individual therapy, group therapy, and school placement assistance). *Id.* ¶¶ 59-60. Plaintiff alleges that as a result of such negligence, O.A. suffered several emergency hospitalizations and his mental state deteriorated overtime. *Id.* ¶¶ 29, 47, 49, 55, 58, 60, 76.

The Neglect Petition

Plaintiff alleges that on some occasions, O.A. was "trial discharged" or permitted to go on "vacations" (i.e., extended home visits) while in ACS' custody. *Id.* ¶ 67. During June of 2020, while O.A. resided in JCCA's Pleasantville, a foster care placement, O.A. took such extended home visit. *Id.* ¶ 67. By Neglect Petition dated September 30, 2020, ACS alleged that Plaintiff

failed to provide O.A. mental health medication during his time in her temporary care and sought a Court finding of neglect. *Id.* ¶ 70; Glover Dec., Exhibit C. The Neglect Petition reflects that ACS received reports from JCCA, a nurse practitioner, and O.A.'s social worker concerning a letter Plaintiff sent to JCCA that noted her desire for O.A. to discontinue medication. *Id.* The Neglect Petition states that following a medical assessment of O.A., JCCA determined that O.A. had not taken medication since June 2020, the date that O.A. was released to Plaintiff for an extended home visit. *Id.* The Neglect Petition also documents several of O.A.'s violent episodes and notes that on one occasion, Plaintiff "threatened to hit [O.A.] with a bat." *Id.* Plaintiff alleges, without sufficient details, that the Neglect Petition was based on false information and "riddled with legal impossibilities and factual inaccuracies." Compl. ¶¶ 69-72.

Neglect Proceedings & Disposition

Plaintiff alleges that on or around October 21, 2020, ACS withdrew the voluntary placement proceeding. *Id.* ¶ 79. Plaintiff then requested an immediate return of O.A. to her care pursuant to FCA § 1028. *Id.* ¶ 80. Plaintiff alleges that a hearing was conducted over numerous dates, during which the parties presented evidence. *Id.* By Short Order dated February 3, 2021, the Family Court remanded O.A. to Plaintiff's custody for an extended visit due to his exposure to COVID-19. *Id.* ¶ 81; Glover Dec., Exhibit E. Two months later, on April 14, 2021, the Family Court issued a Release Order After 1028 [Hearing], granting Plaintiff's application pursuant to FCA § 1028 and released O.A. to Plaintiff's custody subject to conditions necessary to prevent O.A. from experiencing any lapses in mental health treatment. Glover Dec., Exhibit F. By Order dated May 20, 2021, the Family Court dismissed the Neglect Petition "based upon [ACS'] earlier withdrawal" and "on the consent of all parties." Glover Dec.; Exhibit G; Compl. ¶ 82.

Plaintiff's Damages & Requested Relief

As a result of these alleged events, Plaintiff seeks compensatory and punitive damages and attorneys' fees for alleged malicious prosecution, interference with the right to intimate association, substantive due process violations, and a denial of a fair trial based upon the Neglect Petition and related proceedings. *See* Compl. at 12-24. Plaintiff further seeks damages for a variety of negligence claims based on all Defendants' purported failure to properly monitor, supervise and provide O.A. with adequate medical care during his time in various placements. *Id.* at 17-24. City Defendants now move to dismiss these claims.

ARGUMENT

POINT I

PLAINTIFF FAILS TO STATE A CLAIM FOR A FOURTEENTH AMENDMENT VIOLATION

a. Plaintiff's Substantive Due Process and Right to Intimate Association Claims Fail.

Plaintiff's Complaint alleges violations of her liberty interest in the custody of her child and her right to intimate association. Although the latter claim is pled as a First Amendment violation, the right to intimate association is "more appropriately analyzed under the Fourteenth Amendment." *Dabah v. Franklin*, 19-CV-10579 (ALC), 2022 U.S. Dist. LEXIS 60884, at *8-10 (S.D.N.Y. Mar. 31, 2022); *Uwadiegwu v. Dep't of Soc. Servs. of the Cnty. of Suffolk*, 91 F. Supp. 2d 391, 398 (E.D.N.Y. 2015) ("[C]ourts within this Circuit specifically addressing the right to intimate association vis-a-vis parent-child relationships have analyzed the right under the principles of substantive due process rather than the First Amendment."). Under the substantive due process legal framework, both claims fail.

Parents have a "constitutionally protected liberty interest in the care, custody and management of their children." *Southerland v. City of New York*, 630 F.3d 127, 142 (2d Cir. 2011).

This substantive due process right of custody is "counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Id.* at 152 (quoting *Wilkinson ex rel. Wilkinson v. Russel*, 182 F.3d 89, 104 (2d Cir. 1999)). To state a claim for a violation of such liberty interest, "a plaintiff must demonstrate that the state action depriving [her] of custody was "so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection." *Cox v. Warwick Valley Cent. Sc. Dist.*, 654 F.3d 267, 275 (2d Cir. 2011) (internal quotations and citation omitted). Notably, the Second Circuit "has adopted a standard governing case workers which reflects the recognized need for unusual deference in the abuse investigation context. An investigation passes constitutional muster provided simply that case workers have a 'reasonable basis' for their findings of abuse." *Dabah*, 2022 U.S. Dist. LEXIS 60884, at *12 (quoting *Wilkinson*, 182 F.3d at 104).

Here, although the Family Court proceedings resulted in the four-month removal of O.A. from Plaintiff's care, Plaintiff fails to show that ACS' conduct was shocking, arbitrary, and egregious. Plaintiff alleges in a conclusory manner that the Neglect Petition was based upon false information, but the Neglect Petition itself establishes that ACS had a reasonable basis for its investigation and charges. *See* Glover Dec., Exhibit C. The Neglect Petition reflects that ACS received reports from O.A.'s then-foster care agency, JCCA, a nurse practitioner, and O.A.'s social worker concerning a letter Plaintiff sent to JCCA that noted her desire for O.A. to discontinue medication. *Id.* The Neglect Petition states that following a medical assessment of O.A., JCCA determined that O.A. had not taken medication since June 2020, the date that O.A. was released to Plaintiff for an extended home visit. *Id.* The Neglect Petition also documents several of O.A.'s violent episodes and notes that on one occasion, Plaintiff "threatened to hit [O.A.] with a bat." *Id.*

Such allegations provide a reasonable basis for ACS' charges and fall far short of shocking, arbitrary and egregious conduct. To the extent that Plaintiff alleges that ACS relied on false or misleading reports, Plaintiff does not allege that ACS knew – or even had a reason to suspect – that such reports were false or that ACS manufactured evidence. Indeed, an "ill-advised" or "faulty" investigation does not rise to the level of an unconstitutional investigation, provided that the case worker's action is consistent with "some significant portion of the evidence before her," and "mere failure to meet local or professional standards, without more, should not generally be elevated to the status of constitutional violation." *Grullon v. Administration for Children's Servs.*, 18-CV-3129 (LJL), 2021 U.S. Dist. LEXIS 49614, at *17-18 (S.D.N.Y. Mar. 16, 2021); *Wilkinson*, 182 F.3d at 106.

Additionally, of critical significance to the case at bar, "once [a] court confirmation of the basis for removal is obtained, any liability for the continuation of the allegedly wrongful separation of parent and child can no longer be attributed to the officer who removed the child." *Id.* (internal quotation marks and citations omitted); *Mortimer v. City of New York*, 15 Civ. 7186 (KPF), 2018 U.S. Dist. LEXIS 53492, at *42-47 (S.D.N.Y. Mar. 29, 2018) (dismissing plaintiff-parent's substantive due process claim against case workers where the child was not staying with the parent at the time of the removal and the continued separation was pursuant to a court order). Here, O.A. was not removed from Plaintiff's temporary care until *after* ACS obtained a valid Family Court order authorizing the removal. *See* Glover Dec., Exhibit D. The Order Directing Temporary Removal of a Child After a Petition is Filed recognizes that the removal of O.A. from Plaintiff's care was "necessary to avoid imminent risk to [O.A.]'s life and health." *Id.* Thus, the "Family Court is the entity responsible for denying Plaintiff custody of her child, not [City] Defendants" and "[i]f Plaintiff takes issue with the decisions of the Family Court, [s]he is free to

challenge those in the appropriate forum – the Family Court." *Dabah*, 2022 U.S. Dist. LEXIS 60884, at *12 (quoting *Uwadiegwu*, 91 F. Supp. 3d at 399). Plaintiff's substantive due process and right to intimate association claims therefore fail.

b. Plaintiff Fails to Allege a Procedural Due Process Claim.

Plaintiff's procedural due process claims concerning a purported unfair trial also fail. As a preliminary matter, there is no requirement that Plaintiff be afforded notice and a hearing before governmental interference with access to her child. *Dabah*, 2022 U.S. Dist. LEXIS 60884, at *13. To state a procedural due process claim in this context, "plaintiff[] must allege that the children were removed without parental permission and without Court authorization." *Hollenbeck v. Boivert*, 330 F. Supp. 2d 324, 332 (S.D.N.Y. 2004). Here, as discussed *supra*, the judicial process was employed as ACS obtained a court order before restricting Plaintiff's access to her child. *See* Glover Dec., Exhibit D. Plaintiff further fails to sufficiently allege that City Defendants denied Plaintiff any post-deprivation opportunities to be heard as the Complaint and City Defendants' exhibits reflect that Plaintiff participated in additional Family Court proceedings following the four-month removal of O.A., which resulted in a disposition in "Plaintiff's full favor." Compl. ¶ 82; Glover Dec., Exhibits E, F, G. Thus, Plaintiff fails to state a claim for violations of her procedural due process rights.

POINT II

PLAINTIFF FAILS TO STATE A CLAIM OF MALICIOUS PROSECUTION BECAUSE SHE CANNOT DEMONSTRATE A LACK OF PROBABLE CAUSE OR THAT CITY DEFENDANTS ACTED WITH MALICE

Plaintiff's state and federal malicious prosecution claims warrant dismissal.[1] The Second Circuit law remains unsettled on whether neglect proceedings can give rise to a malicious prosecution claim. *Grullon*, 2021 U.S. Dist. LEXIS 49614, at *30-31 (collecting cases). Assuming *arguendo* that a malicious prosecution claim exists in this setting, under New York law, a plaintiff must demonstrate: (i) the defendant initiated a prosecution against plaintiff; (ii) without probable cause to believe the proceeding can succeed; (iii) the proceeding was commenced with malice; and (iv) the matter terminated in plaintiff's favor. *Id.* at *31-32. When a malicious prosecution claim is premised on a civil proceeding, a plaintiff must show a special injury – that is, "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit." *Id.* (internal citations omitted).

Here, Plaintiff fails to plead non-conclusory facts suggesting that City Defendants did not have probable cause to believe that their prosecution would succeed or that they acted with malice. Under New York law, probable cause in the context of a malicious prosecution claim is "the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." *Id.* (quoting *Berry v. Marchinkowski*, 137 F. Supp. 3d 495, 537 (S.D.N.Y. 2015)). As discussed with respect to Plaintiff's substantive due process claim, the Neglect Petition establishes that ACS had a reasonable basis to suspect that O.A. was neglected. *See* Glover Dec., Exhibit C. The Neglect Petition is supported by detailed reports from JCCA, a social worker, and a nurse practitioner concerning O.A.'s declining mental state during his extended home visit and the imminent harm

[1] Plaintiff brings malicious prosecution claims pursuant to the Fourth Amendment, but these claims fail as a matter of law. As Plaintiff does not allege that she was taken into custody, imprisoned, physically detained, or seized, there is no deprivation of liberty constituting a Fourth Amendment violation here. *See Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004).

O.A. faced due to Plaintiff's failure to provide him with medication. *Id.* The Family Court Order Directing Temporary Removal of Child After a Petition is Filed further supports this conclusion. *See* Glover Dec., Exhibit D. As Plaintiff fails to make a plausible allegation that ACS fabricated evidence or that it acted with malice, Plaintiff fails to state a claim for relief. *See Grullon*, 2021 U.S. Dist. LEXIS 49614, at *33 (granting ACS' motion to dismiss because the neglect petition demonstrated sufficient grounds for neglect and plaintiff failed to plausibly allege that ACS acted with malice or fabricated evidence).

POINT III

DEFENDANT CUDJOE IS ENTITLED TO QUALIFIED IMMUNITY

Defendant Cudjoe is entitled to qualified immunity. It is well-settled that "caseworkers and their superiors are generally entitled to qualified immunity" for their investigative duties if it was objectively reasonable for the caseworkers to believe their conduct did not violate clearly established statutory or constitutional rights of which a reasonable caseworker would have known." *Estate of Keenan v. Hoffman-Rosenfeld*, 16-CV-0149 (SFJ) (AYS), 2019 U.S. Dist. LEXIS 126330, at *58 (S.D.N.Y. July 29, 2019) (quoting *V.S. v. Muhammad*, 595 F.3d 426, 430-31 (2d Cir. 2010)). As discussed in detail *supra*, the Neglect Petition, upon which the crux of Plaintiff's claims are based, passes constitutional muster because ACS had a reasonable basis to suspect child neglect. As such, Defendant Cudjoe is entitled to qualified immunity. *Keenan*, 2019 U.S. Dist. LEXIS 126330, at *64.

POINT IV

PLAINTIFF FAILS TO PLAUSIBLY ALLEGE THE EXISTENCE OF AN UNCONSTITUTIONAL MUNICIPAL POLICY OR CUSTOM

Plaintiff's claims against City Defendants pursuant to 42 U.S.C. § 1983 should be dismissed for failure to state a claim. To hold a municipality liable within the context of § 1983, the plaintiff must establish that the municipality itself was at fault. *Monell v. Dep't of Social Services*, 436 U.S. 658, 609-91 (1978). "The plaintiff must first prove the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries," and second, the plaintiff must establish a causal connection – an "affirmative link" – between the policy and the deprivation of his constitutional rights." *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) (citing *Oklahoma v. Tuttle*, 471 U.S. 808, 824 n. 8 (1985)). Simply put, to establish municipal liability, a plaintiff must demonstrate that an identified municipal policy or practice was the "moving force [behind] the constitutional violation." *Monell*, 436 U.S. at 694.

Here, Plaintiff's *Monell* claim should be dismissed because Plaintiff lacks an underlying claim of a deprivation of a constitutional right. *See Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("*Monell* does not provide a separate cause of action . . . ; it *extends* liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation."). Additionally, even if Plaintiff had alleged a constitutional claim, Plaintiff's *Monell* claims fail because other than adorned legal conclusions, Plaintiff's Complaint is devoid of any further factual enhancement regarding the existence of an unconstitutional policy or custom or any causal connection to the alleged injury. Accordingly, Plaintiff's *Monell* claims should be dismissed.

POINT V

THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIMS

Plaintiff's federal claims against City Defendants are not viable. As such, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state-law claims of negligence (i.e., negligence, negligent supervision, negligent infliction of emotional distress, "loss of services" etc.).[2] District courts have discretion to "decline to exercise supplemental jurisdiction over a state-law claim" under 28 U.S.C. § 1367(c)(3) if "the district court has dismissed all claims over which it has original jurisdiction." *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998) ("[W]here the federal claims are dismissed before trial, the state claims should be dismissed as well."). In determining whether to exercise jurisdiction over supplemental state-law claims, district courts should weigh the factors of judicial economy, convenience, fairness, and comity. *Klein & Co. Futures Inc. v. Bd. of Trade*, 464 F.3d 255, 262 (2d Cir. 2006). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state-law claims." *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006).

The instant case fits the usual scheme. Plaintiff's failure to allege facts to establish a federal claim against City Defendants warrants dismissal. Thus, City Defendants respectfully

[2] During the period alleged in the Complaint, O.A. was placed in only one foster care setting, JCCA's Pleasantville (a residential treatment *center*). During all other times, O.A. was placed in residential treatment *facilities* and community residences, which are licensed by the New York State Office of Mental Health ("OMH"), not the City of New York. A child's admission to these facilities is determined by OMH and governed by 14 NYCRR Parts 583, 584 and 594. ACS does not license, inspect, determine admissions, or have any oversight over OMH mental health treatment settings. Thus, contrary to the allegations in the Complaint, ACS did not monitor or supervise O.A. – or have the authority to do so – during his time in residential treatment facilities and community residences, nor did ACS contract with these entities.

request that the Court, in the interest of fairness and judicial economy, decline to exercise supplemental jurisdiction over Plaintiff's remaining state-law claims.

POINT VI

DEFENDANTS RESPECTFULLY REQUEST A STAY OF DISCOVERY PENDING DISPOSITION OF THE INSTANT MOTION

Finally, City Defendants respectfully request a stay of discovery pending Court determination of the instant motion. To determine whether a stay is appropriate, Courts consider: "(1) [the] breadth of discovery sought, (2) any prejudice that would result, and (3) the strength of the motion." *O'Sullivan v. Deutsche Bank AG*, 17-CV-8709, 2018 U.S. Dist. LEXIS 70418, at *4 (S.D.N.Y. Apr. 26, 2018) (citation omitted). With respect to the third prong of this analysis, Courts consider whether the motion "appears to have substantial grounds," *Zeta Global Corp. v. Maropost Mktg. Cloud*, 20-CV-3951, 2020 U.S. Dist. LEXIS 154634, at * 2 (S.D.N.Y. Aug. 25, 2020), or, stated another way, "does not appear to be without foundation in law." *Chrysler Capital Corp v. Century Power Corp.*, 137 F.R.D. 209, 209-10 (S.D.N.Y. 1991). All requisite elements are met here. As discussed herein, City Defendants' motion to dismiss is predicated upon substantial legal grounds and has a strong likelihood of success. The scope of discovery may "very well be substantially reduced, if not eliminated" by the Court's disposition. *O'Sullivan*, 2018 U.S. Dist. LEXIS 70418, at *27 (internal citation omitted); *Mancuso v. Hynes*, 07 Civ. 3446 (TPC) (ARL), 2008 U.S. Dist. LEXIS 91786, at *2-4 (E.D.N.Y. Nov. 12, 2008) (noting, and upholding on reconsideration, the Court's stay of discovery pending the resolution of a "Rule 12(c) motion [that] could potentially dispose of the action[,] obviating the need for discovery"). Additionally, given O.A.'s significant medical history and placements throughout public and private facilities during a five-year period, and any potential *Monell* discovery, production of such voluminous records would impose a significant burden on the City's resources. Finally, as the parties have merely

filed pleadings in this action without any allegations of imminent harm therein, a stay at this juncture would not result in prejudice to any of the parties. Therefore, City Defendants respectfully submit that a stay of discovery pending Court determination on the instant motion is appropriate.

CONCLUSION

Based on the foregoing, City Defendants respectfully request that the Court grant their motion to dismiss the Complaint in its entirety, stay discovery pending disposition of such motion, and grant such other relief as the Court deems just and proper.

Dated: New York, New York
June 10, 2022

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By: */s/ Sherry N. Glover*
Sherry N. Glover
Assistant Corporation Counsel

Applicant Details

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Last Name	**Goldstein**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **26 Chauncy Street, #6** **City** **Cambridge** **State/Territory** **Massachusetts** **Zip** **02138** **Country** **United States**
Contact Phone Number	**5618182450**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal on Legislation**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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Klarman, Michael
mklarman@law.harvard.edu
617-495-7646

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zachary Goldstein
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April 26, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201

Dear Judge Matsumoto:

I write to apply for a clerkship in your chambers for the 2025 term and any future openings. I am currently a third-year student at Harvard Law School. While at Harvard, I have served as a Supervising Editor and Symposium Director for the *Journal on Legislation*, a law clerk to Senator Jon Ossoff and on the House Oversight Committee, and a judicial extern to Chief Justice Kimberly S. Budd of the Massachusetts Supreme Judicial Court. These experiences, along with my work in the Election Law and Democracy & Rule of Law Clinics, have helped me develop the legal research and writing skills that I believe would serve me well as a clerk in your chambers. I would also bring with me the lessons in organizational thinking and effective teamwork that I learned working as a management consultant at Bain & Co. prior to law school. This past summer, I worked as a summer associate at Gibson Dunn in New York and returned to Senator Ossoff's office, further developing my research, writing, and communication skills. I plan to return to Gibson Dunn following graduation and hope to work in government service in the future.

I believe that I could positively contribute to your chambers community, both through my detail-oriented approach to work and through the community-building skills I have refined across my academic and professional life. I am particularly excited by the prospect of clerking for you because of the insights you bring to the bench from the diverse experiences in your own professional background across both the private sector and the U.S. Attorney's office. I would delight in the opportunity to draw from that wealth of knowledge while assisting in the important work of your chambers.

Enclosed, please find my resume, law school transcript, and writing sample. The following professors have written letters of recommendation being submitted separately:

- Prof. Laurence H. Tribe, larry@tribelaw.com, (617) 512-7018
- Prof. Michael Klarman, mklarman@law.harvard.edu, (617) 999-5151

The following references also welcome any inquiries:

- Judge Joseph A. Greenaway, Jr., United States Court of Appeals for the Third Circuit, Chambers_of_Judge_Joseph_A_Greenaway@ca3.uscourts.gov, (908) 963-4196
- Prof. Nicholas Stephanopoulos, nstephanopoulos@law.harvard.edu, (617) 998-1753
- Prof. Cass Sunstein, csunstei@law.harvard.edu
- Viviana Hanley, Former Law Clerk to Chief Justice Kimberly S. Budd, Massachusetts Supreme Judicial Court, vivianahanley@gmail.com, (617) 902-8858
- Sara Schaumburg, General Counsel, Office of Senator Jon Ossoff, United States Senate, sara_schaumburg@ossoff.senate.gov, (202) 329-1349

I would welcome any opportunity to interview with you. Thank you in advance for your time and consideration.

Sincerely,

Zachary Goldstein

Zachary Goldstein

Zachary Goldstein

26 Chauncy Street, #6, Cambridge, MA, 02138 | (561) 818-2450 | zgoldstein@jd23.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, MA
J.D. Candidate, May 2023

- Professor Laurence Tribe, Research Assistant
- Professor Michael Klarman, Research Assistant
- Professor Nicholas Stephanopoulos, Teaching Fellow - *Constitutional Law* (Spring 2023)
- Professor Cass Sunstein, Research Assistant & Teaching Fellow - *Making Change When Change is Hard* (Fall 2022)
- Judge Joseph Greenaway, Research Assistant & Teaching Fellow - *Great Cases of the Supreme Court* (Summer-Fall 2022)
- *Journal on Legislation*, Symposium Director, Supervising Editor
- Heyman Summer Internship (competitive honor for mentoring and networking in federal government work)

University of Pennsylvania, Philadelphia, PA
B.A. summa cum laude and with Distinction in International Relations, May 2019

- Phi Beta Kappa**;** Sigma Iota Rho (international relations honor society); Pi Sigma Alpha (political science honor society)
- Honors Thesis: *Shrouded in Controversy: Conceptions of the Hijab and Islam in Popular American Discourse*

EXPERIENCE

Harvard Law School Election Law Clinic, Cambridge, MA — Fall 2022
Clinical Student

- Drafted portions of amicus brief to the U.S. Supreme Court in *Moore v. Harper*, detailing doctrinal issues arising from the independent state legislature theory
- Managed relationships with client and expert stakeholders in Voting Rights Act case, including leading meetings, drafting interrogatories, and conducting defensive discovery

Office of U.S. Senator Jon Ossoff, Washington, D.C. — Winter 2022; August-September 2022
Law Clerk, Rules and Judiciary Committee Portfolios

- Crafted legislative proposals, including coordination with non-governmental organizations and internal stakeholders
- Assisted with hearings, including drafting background memos and witness questions and providing in-hearing support

Gibson, Dunn & Crutcher LLP, New York, NY — May-July 2022
Summer Associate, Litigation Department

- Conducted legal and policy research and composed internal memos in support of ongoing litigation and client advising
- Drafted sections of appellate briefs, aligning with senior attorneys on litigation strategy

Chambers of Chief Justice Kimberly S. Budd, Massachusetts Supreme Judicial Court, Boston, MA — Spring 2022
Legal Extern

- Authored bench memos in support of preparations for oral argument and research memos in support of opinion drafting
- Reviewed applications for Further Appellate Review, analyzing the decisions below and applicants' legal arguments

Protect Democracy, Cambridge, MA — Fall 2021
Clinical Student

- Researched state statutory and constitutional law relating to elections and state legislative power
- Produced memo analyzing the constitutionality of judicial review provisions in proposed election reform legislation

House Committee on Oversight and Reform, Washington, D.C. — Summer 2021
Law Clerk, Investigations Team

- Conducted research related to committee investigations, including analyzing source documents & identifying relevant law
- Composed sections of full committee and special reports, including synthesizing information, coordinating with committee stakeholders, and promoting key narratives

Bain & Company, New York, NY — September 2019 – August 2020
Associate Consultant

- Implemented large-scale survey design processes around customer experiences with financial services & utilities products
- Analyzed large data sets, produced Excel models, and presented to upper-level management at Fortune 500 companies

PERSONAL

Hebrew & Spanish, foreign pop music, travel planning, wilderness first aid, word games, & political biographies

Harvard Law School

Date of Issue: April 12, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Zachary B Goldstein
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 6 Rave, Theodore	P	4
1001	Contracts 6 Bar-Gill, Oren	H	4
1002	Criminal Law 6 Rabb, Intisar	H	4
1006	First Year Legal Research and Writing 6B Doyle, Colin	P	2
1005	Torts 6 Hanson, Jon	H	4

Fall 2020 Total Credits: 18

Winter 2021 Term: January 01 - January 22

1056	Pathways to Leadership Workshop for the Public Sector Crawford, Susan	CR	2

Winter 2021 Total Credits: 2

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 6 Goldberg, John	H	4
1006	First Year Legal Research and Writing 6B Doyle, Colin	P	2
3022	Law and Politics Workshop Stephanopoulos, Nicholas	H	2
1003	Legislation and Regulation 6 Renan, Daphna	P	4
1004	Property 6 Fisher, William * Dean's Scholar Prize	H*	4

Spring 2021 Total Credits: 16
Total 2020-2021 Credits: 36

Fall 2021 Term: September 01 - December 03

2000	Administrative Law Freeman, Jody	P	4
2035	Constitutional Law: First Amendment Parker, Richard	P	4
8049	Democracy and the Rule of Law Clinic Florence, Justin	H	3
2208	Great Cases of the Supreme Court Greenaway, Joseph	CR	1
2994	Legal Tools for Protecting Democracy and the Rule of Law in America Florence, Justin	H	2

Fall 2021 Total Credits: 14

Winter 2022 Term: January 04 - January 21

8099	Independent Clinical - Office of Senator Jon Ossoff Stephanopoulos, Nicholas	CR	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

2676	Advanced Issues in Administrative Law and Theory Vermeule, Adrian	H	2
2928	Election Law Charles, Guy-Uriel	H	3
2079	Evidence Rubin, Peter * Dean's Scholar Prize	H*	2
8099	Independent Clinical - Judge Kimberly S. Budd - Massachusetts Supreme Judicial Court Bowie, Nikolas	CR	4
7008W	Writing in Conjunction with Election Law Charles, Guy-Uriel	H	1

Spring 2022 Total Credits: 12
Total 2021-2022 Credits: 28

Fall 2022 Term: September 01 - December 31

8053	Election Law Clinic Greenwood, Ruth	H	3
3005	Election Law Clinical Seminar Greenwood, Ruth	H	2
2697	From Protest to Law: Triumphs and Defeats in Struggles for Racial Justice, 1950-1970 Kennedy, Randall	H	3
2142	Labor Law Sachs, Benjamin	H	4
3202	The United States Supreme Court Sunstein, Cass	H	2

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Assistant Dean and Registrar

HARVARD LAW SCHOOL OFFICE OF THE REGISTRAR VE RI TAS LEX ET JUSTITIA

Harvard Law School

Record of: Zachary B Goldstein

Date of Issue: April 12, 2023
Not valid unless signed and sealed

	Fall 2022 Total Credits:		14
	Winter 2023 Term: January 01 - January 31		
2169	Legal Profession: Government Ethics - Scandal and Reform Rizzi, Robert	H	3
	Winter 2023 Total Credits:		3
	Spring 2023 Term: February 01 - May 31		
2651	Civil Rights Litigation Michelman, Scott	~	3
3094	Climate Change and the Politics of International Law Orford, Anne	~	3
2086	Federal Courts and the Federal System Fallon, Richard	~	5
3213	The Law of Presidential Elections Schwartztol, Larry	~	2
	Spring 2023 Total Credits:		13
	Total 2022-2023 Credits:		30
	Total JD Program Credits:		94

End of official record

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Transcript questions should be referred to the Registrar.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010

Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

April 27, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in strong support of Zachary Goldstein's application to clerk in your chambers. Zach will receive his Harvard Law School JD in May 2023. Although Zach wasn't a student in any of the classes I taught before taking emeritus status, I selected him (through a set of interviews winnowing down a very large number of strong applicants to a set of just three) as one of the research assistants I brought on board in the summer of 2021 to help me with a number of challenging projects related to several ongoing constitutional controversies centered first around the unusual Texas law (SB-8) offering bounties to private vigilantes who sue abortion clinics and others facilitating abortions, and then around the history and operation of the federal statutes criminalizing "insurrection," 18 U.S.C. §2383, and seditious conspiracy, 18 U.S.C. §2384.

More recently, Zach assisted me in my preparation of a detailed memorandum that I submitted to Congresswoman Carolyn Maloney in her capacity as Chair of the U.S. House of Representatives Committee on Oversight and Reform addressing the status of the Equal Rights Amendment (ERA) now that a 38th State (Virginia) approved the measure in 2020, a complex topic on which Zach had done some prior research for a paper written under the supervision of my colleague, Professor Nicholas Stephanopoulos, that Nick found to be, in his words, "thorough and convincing." Zach also did some challenging research for me this April in connection with the potential invocation by President Biden of the International Emergency Economic Powers Act (IEEPA) to seize and repurpose for Ukraine's benefit billions of dollars of sovereign Russian Central Bank assets frozen in United States banks.

Over the course of his work with me, beginning in July 2021 and continuing through April 2022, Zach generated just under a dozen excellent memos, some of them in cooperation with one or another of my research assistants but most of them (including his particularly fine work on the ERA's status) as solo efforts. I have always found Zach's work to be reliable, his command of the relevant historical and legal materials all I had hoped for, his insights right on the money, his judgments sound, and his writing clear.

That said, my database for evaluating Zach's abilities is admittedly somewhat narrower than what I have had available to me in prior years when recommending my best research assistants for highly competitive clerkships like yours. Nonetheless, I feel confident enough in my assessment to say that I believe Zach is an exceptional candidate for a clerkship with you.

Zach's CV and academic transcript are of course very impressive and speak for themselves, so I won't undertake to note the highlights here except to say that they clearly demonstrate both his native intellectual strength and his serious commitment to learning for its own sake and to putting his education to work in the public interest.

Because of the restrictions that Covid imposed on my interactions both with my students and with my research assistants, I can only speculate about how Zach would fit in with the operation of your chambers, but he has been a pleasure to work with virtually, and I can report that both my faculty assistant and my other research assistants always found him an affable, cooperative, and upbeat member of the team I assembled over the past academic year to assist me with a range of projects that were different from, but no less challenging than, those I imagine you would typically assign your law clerks in preparing you for oral arguments and in working with you on drafting opinions.

Because I understand that Zach has done impressive research work for some of my most demanding and discerning colleagues including Cass Sunstein and Mike Klarman, I trust that they will add further depth and detail to my enthusiastic support for Zach's application and very much hope that you will select him as one of your law clerks.

All the best,

Laurence H. Tribe
Carl M. Loeb University Professor Emeritus

Laurence Tribe - tribe@law.harvard.edu - 617-495-1767

May 10, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in support of the clerkship application of Mr. Zachary ("Zach") Goldstein, whom I have gotten to know reasonably well during his first two years at Harvard Law School. Zach was a star in my 1L reading group, which he took during the spring semester of his 1L year at HLS. He then worked as one of my research assistants during his second year of law school and turned in a stellar performance. Zach is extremely bright, hardworking, articulate, reliable, and cheerful. I am confident that he will make an excellent judicial law clerk.

As noted, Zach took my 1L reading group in the spring of 2021, his second semester of law school. This class was entitled "Courts, Social Change, and Political Backlash," and we spent a week on Brown and school desegregation, a week on Furman and the death penalty, a week on Roe and abortion, and a week on Obergefell and gay marriage. (These 1L reading groups meet 4 times a semester for 2 hours per session.) The point of this particular reading group was to get students thinking about the political backlash that court decisions that deviate significantly from public opinion can produce—not necessarily by way of criticizing the rulings, but simply to advance the students' understanding of how court decisions fit into a social and political context and how they are part of a conversation rather than providing a definitive resolution.

Because this reading group was conducted entirely on zoom, during the COVID pandemic, I was able to keep unusually detailed notes from our discussions. In a moment, I will share with you some of Zach's contributions to class discussion, but let me preface those by reproducing for you my general observations on Zach several months after the seminar ended:

Was probably the best in the spring reading group. Volunteered to do RA work for me this year; came to house around Sept. 14 or 15 to discuss. Incredibly articulate, enthusiastic, energetic; really well informed re politics; interesting stuff to say about Joe Manchin dilemma, 2022 Senate races; very likeable; quite confident but not arrogant; would be super fun to have around; not intimidated at all by a professor; seems very comfortable in own skin.

During the semester of our reading group together, Zach also met with me via zoom twice during office hours. (He also stuck around after the class session had ended, for further discussion.) Both times I recorded a few notes in my "diary" for the course —entries that I will reproduce for you here:
2/9/21: Zach zoomed with me to discuss being a research assistant (not necessarily for me). Really likeable guy, mature, genuine, respectful of my time, thoughtful in what he wants to do. Very impressive.

4/13/21: office hours visit with Zach Goldstein: Really good conversation about politics; he is incredibly well informed; thoughtful about filibuster reform, Court reform, etc.; frustrated by fact that Republican crazies likely to win reelection in 2022; appreciate his being respectful of my time; good guy; likeable; smart and knowledgeable.

My most detailed information about Zach is contained in the notes I kept of the discussions during our 1L reading group. Again, because this class was conducted entirely via zoom, it was pretty easy for me to keep detailed notes of the conversation—more than I could have done during in-person sessions when I might not have been able to be on my computer during the class discussion. I will try not to give you more detailed information than will be helpful for your purposes, but, as already noted, Zach was the best—and possibly the most frequent—participant in our discussions, so there is a lot of potentially relevant information to share.

Our first session, on Brown v. Board of Education, began with my posing a question to the students about what (law clerk) William H. Rehnquist meant when he said in a memo to Justice Robert Jackson regarding Brown that for the Court to intervene in this case, it would be differing from the New Deal Court "only in the kinds of litigants it favors and the kinds of special claims it protects." I asked the students what Rehnquist meant by this statement, whether he was correct, and what is the difference—if any—between the Court's protecting property rights and rights to racial equality?

Zach began the conversation by noting the huge difference between public opinion on race issues then and today. While we see Brown as an obvious constitutional ruling and condemn white supremacy as an obvious evil, half the country in 1954 believed that Brown had been wrongly decided. This made the issue potentially very difficult for the Justices. Zach also nicely noted, drawing upon the internal Court materials I had given the students in the readings, that white southerners did not regard racial segregation, which purported to be "separate but equal," as the same thing as racial discrimination.

Later in the discussion, Zach explained the importance of the Cold War imperative for racial equality in the Justices' thinking about Brown. That is, the federal government had urged the Justices to invalidate state-mandated segregation in public education largely on the ground that the Soviets were scoring powerful propaganda points in the Cold War by portraying democratic capitalism as synonymous with white supremacy. Zach also made the nice point that, even today, the United States

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continues to play a vitally important role in modeling democracy for a world that is increasingly suffering a democratic recession.

Finally, Zach noted towards the end of this first session the importance of distinguishing between equality and equity, pointing to the continuing legacy of state-mandated racial segregation in public education. He talked about his own observations from attending public schools in South Florida. Noting that Florida had been one of the last southern states to desegregate its schools after Brown, Zach explained how magnet school programs, intended to integrate schools, had mostly benefitted wealthy white children. He also alluded to New York City's special "exam" schools, which have been increasingly dominated by Asian students in recent years, and now enroll very few black and brown children. Zach knows a lot about what is going on in today's world, and is very articulate and generous in sharing that knowledge with his fellow students. This made him an extremely valuable participant in the reading group.

Our reading group's second session was on Furman and the death penalty in the 1970s. Zach began by connecting the death penalty issue, and the enormous political backlash generated by Furman, to President Nixon's "war on crime" theme from his 1968 presidential campaign. During the session, Zach also displayed an impressive command of death penalty doctrine, noting and explaining twenty-first century cases that were not covered in the readings, such as Atkins, Roper, and Glossip. He rightly noted that several Justices late in their tenures on the Court—Justices Breyer, Stevens, and Blackmun—concluded, after much reflection, that the death penalty should be ruled unconstitutional in all its iterations. My notes indicate that he made a variety of "great points" here, though they are a bit too sketchy to allow me to precisely reconstruct Zach's thought processes.

Later in this session, I posed this question to the students: "Why, after decisions such as Brown and Obergefell, did public opinion continue to change in the direction the Court was pushing, but not after Furman and Roe? Zach responded by noting that "proximity to suffering influences opinion on these sorts of issues." That is, most people only know about the death penalty in the abstract, and probably have no idea how prevalent the problem of wrongful convictions is. Court rulings have the effect of making issues salient.

Zach also offered a nice response to another question I posed: "Did Justices White and Stewart think they were effectively killing the death penalty in Furman? Do you think they expected legislatures to respond to the Court's ruling by enacting mandatory death penalties for certain crimes?" Zach noted that Justices White and Stewart didn't seem convinced that the death penalty was unconstitutional. They were not willing to go as far as Justices Brennan and Marshall were, but neither were they willing to stand in the way of a declaration that the death penalty was unconstitutional as currently practiced. I really liked Zach's point that White and Stewart seemed not to wish to be "on the wrong side of history." He also neatly tied this point together with the Rehnquist memo we had read the previous week (and which I mentioned above). Nobody, Zach observed, wanted to go down in history as "that justice."

Our third session of the reading group was on Roe v. Wade and abortion. I began with a series of questions about Roe's normative defensibility: E.g., Was Roe a justifiable outcome based on the traditional sources of constitutional law—text, original understanding, precedent, custom and tradition? Was Roe justifiable in light of Griswold v. Connecticut (1965)? Doesn't the 9th Amendment invite courts to come up with rights worthy of protection besides those expressly enumerated in the Bill of Rights? I also asked them what they thought about the criticisms of Roe offered (in the readings) by eminent Constitutional Law scholar John Hart Ely and then-Judge Ruth Bader Ginsburg.

Zach began the discussion with Ginsburg's criticism of Roe, which was, in part, that the privacy right was a weaker justification for the ruling than an emphasis on the gender inequality inherent in abortion restrictions would have been. Zach agreed with Ginsburg about this, as well as with her point that a gradual expansion of abortion rights would have been preferable to the more absolutist ruling in Roe. My notes indicate that "these were good points, even though I regard them as mistaken, and I really appreciated his willingness to go first in the discussion." He also knowledgeably referred to the present Court's dismantling of Roe (which has proved prescient).

Later, Zach offered an interesting hypothesis about even this conservative Court's (or at least Justice Gorsuch and Chief Justice Roberts') willingness in statutory cases such as Bostock to reach progressive results on issues such as gender identity and sexual orientation, while predicting that these Justices would eschew such results in constitutional cases. Zach also (accurately) predicted that Chief Justice Roberts, perhaps more sensitive to questions of institutional stature and reputation, given his role as Chief Justice, might be less eager than the other conservatives to flatly overrule Roe.

On the question of whether Roe generated political backlash, how its backlash compared with the one that followed Furman, and which factors seemed to predict political backlash to Court rulings, Zach offered some interesting thoughts. He knowledgeably described the role of Phyllis Schlafly in defeating the Equal Rights Amendment in the 1970s, which was partly a manifestation of backlash against Roe. He also described how many states had been liberalizing abortion restrictions in the years preceding Roe, and how the Equal Rights Amendment got entangled with the politics of abortion. I was impressed with how much Zach knew about the defeat of the ERA, which was a topic not touched upon at all in this session's readings about Roe.

In explaining the different backlashes and judicial responses thereto in Furman and Roe, Zach emphasized that the Justices simply were not as invested in invalidating the death penalty, and thus did not dig in their heels and resist state efforts to circumvent their decision, as the Justices did with analogous state efforts to circumvent or even defy Roe. He also made the

neat point that one important difference between attitudes on gay rights and on abortion is that the "coming out" phenomenon leads to predictable shifts towards greater tolerance of homosexuality, while most women even today decline to speak publicly about their abortions because of the stigma in doing so. This is an important point. I also agreed with Zach on another significant point—that for the Court to overturn Roe would not indicate that it would be willing to overturn Obergefell, given that public opinion on the latter issue has continued to evolve strongly in support of gay marriage (up to 70 percent support today), while on abortion it has been essentially frozen over the last fifty years.

To prevent an already too-long letter from getting even longer, I will skip over Zach's participation in our final session on Obergefell and gay marriage, other than to say that he was, once again, among the top two participants in the discussion, in terms of both quantity and quality. Instead, I will move directly to a brief description of Zach's work for me as a research assistant.

Because I had been so impressed with Zach in our 1L reading group, I was thrilled to hire him when he volunteered to work as my research assistant this past academic year. In the fall, Zach completed for me three lengthy assignments on course revisions for my Constitutional History II class—From Reconstruction to the Civil Rights Movement. All three assignments were on race—respectively, during the "Plessy era," during the period between the two world wars, and during the World War II era. Zach's assignments included reading the existing assignments, estimating the time required for that reading, giving me his evaluation of the quality of the assignment, suggesting material to add or excise from the existing assignment as well as elaborating upon his reasons for those suggestions, and then re-estimating the time required to read the revised assignment. Zach worked hard and efficiently, asked good questions, demonstrated good judgment, submitted his assignments in a timely manner, and always was willing—indeed eager—to volunteer for more work.

Zach's work in the spring semester was entirely on one assignment related to my ongoing efforts to come up with a new set of materials for my Constitutional Law class. Zach worked on an assignment entitled "Suing the President," which covered nearly the entire sweep of American history. He must have devoted dozens of hours to the assignment, and I will briefly describe his work product to you.

Zach began by reproducing relevant provisions from the U.S. Constitution, and then created a time line of all relevant Supreme Court decisions, from Marbury in 1803 to the Trump litigation that was "resolved" by the Court in 2000. For each ruling—which included such old chestnuts as the Aaron Burr treason trial, Mississippi's lawsuit against President Andrew Johnson to enjoin enforcement of the 1867 Reconstruction Act, and the Watergate tapes case—Zach economically and precisely described the issue and the Court's resolution of the controversy.

Then, Zach turned to taking a shot at editing the more prominent cases that I wanted the students to read excerpts from, including Marbury, Nixon v. United States, and Trump v. Mazars. His editing was superb, and will serve as a time-saving blueprint when I prepare a final version of the materials.

The second part of the draft Constitutional Law assignment consisted of material related to the question of whether a president can be criminally prosecuted while in office. Here, Zach reproduced the relevant constitutional provisions, and edited a memo to Special Prosecutor Leon Jaworski during the Watergate affair and another one written by the Office of Legal Counsel in 2000.

The draft assignment is 44 pages, and Zach managed to produce it in about 5–6 weeks. As noted, it must have taken dozens of hours to complete. It is an extremely impressive piece of work.

Zach has compiled a fine academic record at Harvard Law School, which is all the more impressive given his significant involvement in an array of extracurricular activities, including internships, journal work, and research and teaching assistance for several different HLS professors. Zach is not only bright and hardworking, but he is also committed to involvement in the community around him.

In sum, I am confident that Zach Goldstein will make some fortunate judge an excellent judicial law clerk. He is smart, industrious, reliable, articulate, confident, and a pleasure to interact with. I recommend him to you with great enthusiasm.

Yours sincerely,

Michael Klarman

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Zachary Goldstein
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WRITING SAMPLE

Drafted Spring 2022

The following is an excerpt from a bench memo prepared for the chambers of the Hon. Kimberly S. Budd, Chief Justice of the Massachusetts Supreme Judicial Court for a case heard during the April sitting. The memo was composed based solely on publicly available briefing and has been reproduced here with approval of chambers. At issue in the case were the validity of the interlocutory appeal and the applicability of charitable immunity and religious autonomy defenses.

Please note that the bench memo follows the Supreme Judicial Court's citation style.

This writing sample was the draft submitted to chambers and has not been edited by others.

INTRODUCTION

Plaintiff-Appellee John Doe sued the Roman Catholic Bishop of Springfield ("RCBS") and eight associated individuals, asserting two sets of claims relating to alleged sexual abuse Doe experienced at the hands of church officials in the 1960's and RCBS's modern review of those allegations. RCBS moved to dismiss under Massachusetts Rule of Civil Procedure Rule 12(b)(6) the first set of claims, claiming immunity under the theory of charitable immunity. All defendants moved to dismiss the second set of claims under Massachusetts Rule of Civil Procedure Rule 12(b)(1), asserting that the First Amendment religious autonomy doctrine deprived the Superior Court of subject matter jurisdiction. The Superior Court denied the motions, ruling: (1) that assessing whether charitable immunity covered the alleged abusive conduct in the first set of claims required further inquiry, and (2) that the court could address the second set of claims without entangling itself in matters of church doctrine. The single justice of the Appeals Court denied Defendants' motion under Massachusetts Rule of Appellate Procedure 6(a) for a stay of proceedings in the Superior Court. Defendants appealed both the single justice's order and the Superior Court's denial of the motion to dismiss. These appeals were consolidated and now appear before us after we transferred the case sua sponte from the Appeals Court.

We should DISMISS the appeal. The doctrine of present execution does not apply where, as in this case, relief is available after final judgment. If this court disagrees, we should AFFIRM on the merits, as the doctrine of charitable immunity does not apply to actions taken out of the scope of an organization's charitable purpose, and Defendants failed to meet their burden for a religious autonomy defense.

BACKGROUND

Plaintiff-Appellee John Doe filed a complaint against the Roman Catholic Bishop of Springfield ("RCBS"), a corporation sole organized under Chapter 368 of the Acts of 1898, and eight associated individuals, asserting two sets of claims.[1] The first set of claims is directed solely at RCBS and allege that the plaintiff experienced sexual abuse at the hands of church officials in the 1960s, including by a former Bishop, Christopher Weldon.[2] RCBS Br. App. 81-86. Plaintiff alleges that when he was approximately nine years old, Weldon, Father Clarence Forand, and Father Edward Authier repeatedly raped him both on and off the church campus where he served as an altar boy. RCBS Br. App. 72.

The second set of claims is directed at all defendants and involve negligent and tortious conduct that the plaintiff alleges occurred during RCBS's investigation and review process.[3] RCBS Br. App. 86-94. Plaintiff alleged the following relevant facts in the Complaint. When Plaintiff's memory of these assaults surfaced in 2013, he met Monsignor Ronald Yargeau, the head altar boy at the time of the assaults, who referred him to Defendant Reverend Monsignor Christopher Connelly, a RCBS employee. RCBS Br. App. 74. In 2014, Plaintiff met with Connelly and Defendant Patricia Finn McManamy, RCBS's Director of the Office of Safe Environment and Victim Assistance, who both failed to report Plaintiff's complaints to the District Attorney, either after this first meeting or following a subsequent meeting between McManamy and Plaintiff in

[1] A corporation sole is "a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions, such as kings, bishops, rectors, vicars, and the like." Black's Law Dictionary (11th ed. 2019). See also Overseers of Poor of City of Boston v. Sears, 39 Mass. 122 (1839).

[2] The first set of claims includes assault (Count I), battery (Count II), intentional infliction of emotional distress (Count III), negligent infliction of emotional distress (Count IV), conspiracy (Count V), negligent supervision (Count VI) and breach of fiduciary duty (Count VII).

[3] The second set of claims includes negligence (Count VIII), negligent supervision (Count IX), negligent infliction of emotional distress (Count X), intentional infliction of emotional distress (Count XI), civil conspiracy (Count XII), violation of the Massachusetts Civil Rights Act, G.L. c.12, § 11I (Count XIII) and defamation (Count XIV).

2016. Id. McManamy first reported Plaintiff's allegations to the District Attorney in 2018. Id. She also referred the complaint to Defendant Kevin Murphy, RCBS's investigator, who interviewed Plaintiff and then presented a report to RCBS's Review Board. RCBS Br. App. 75.

Plaintiff himself met with the Review Board to recount his assault by Weldon and others. RCBS Br. App. 76. The Review Board found Plaintiff's allegations regarding Weldon, Authier, and Forand credible. Id. However, Weldon was not added to RCBS's list of credibly accused priests, and RCBS denied to a reporter from The Berkshire Eagle that Weldon had been involved himself in any instances of sexual assault. RCBS Br. App. 77. The reporter published an article referencing the Board's finding of credibility, which led RCBS to again deny Weldon's involvement, despite their earlier findings. RCBS Br. App. 79. RCBS employees communicated with each other about altering Murphy's report to reflect this narrative. Id. Based on RCBS's repeated denials of Weldon's involvement, The Berkshire Eagle published a second article. RCBS Br. App. 80. This led to an investigation run by retired Judge Peter Velis, which concluded that Plaintiff's allegations surrounding Weldon were "unequivocally credible." RCBS Br. App. 81. RCBS then removed Weldon's name from various Church facilities and added his name to the list of credible allegations. RCBS Br. 14.

Defendants filed a joint motion to dismiss in response to the Complaint. RCBS Br. 9. As to the first set of counts, RCBS, seeking dismissal under Rule 12(b)(6), argued that Plaintiff failed to allege conduct by RCBS itself as a corporation sole, separate from Weldon's actions as an individual, and that the corporation sole was immune from tort liability at the time of the assaults under the doctrine of charitable immunity. Id. The doctrine of charitable immunity provides immunity from tort liability for various actions carried out by charitable entities. See, e.g., Lynch v. Crawford, 483 Mass. 631, 637-638 (2019). All Defendants sought to dismiss the second set of

counts under Rule 12(b)(1), arguing that the religious autonomy doctrine precluded subject matter jurisdiction for the Superior Court under the First Amendment. RCBS Br. 10. Prior to the Supreme Court's ruling in Hosanna-Tabor, 565 U.S. 171, 195 n.4 (2012), the religious autonomy doctrine "prohibit[ed] civil courts," under the First Amendment, "from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization." Hiles v. Episcopal Diocese of Massachusetts, 437 Mass. 505, 510 (2002). However, the Court in Hosanna-Tabor ruled that the religious autonomy doctrine served as an affirmative defense, not a bar to subject matter jurisdiction. The Superior Court denied the joint Motion, ruling that assessing whether charitable immunity covered the alleged abusive conduct in the first set of claims required further inquiry, and that the Court could address the second set of claims without entangling itself in matters of church doctrine. RCBS Br. 10. Defendants appealed, and we transferred the case to the SJC sua sponte after it was initially docketed in the Appeals Court.

STANDARD OF REVIEW

This court reviews denials of motions to dismiss de novo, "accepting as true all well-pleaded facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor." Shaw's Supermarkets, Inc. v. Melendez, 484 Mass. 338, 358 (2021). We "must determine 'whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief.'" Dunn v. Genzyme Corporation, 486 Mass. 713, 717 (2021) (citation omitted).

DISCUSSION

Defendants advance their appeal on several grounds. First, Defendants argue they may bring this appeal of an interlocutory order under the doctrine of present execution, as appeal from final judgment would fail to protect them from the burdens of litigation or to vindicate their

threshold claims of immunity from suit. On the merits, Defendant RCBS asserts that the facts included in the complaint sufficiently establish common law charitable immunity from the first set of counts. Defendants further argue that the Superior Court's subject matter jurisdiction over the second set of counts is precluded by the First Amendment's religious autonomy doctrine, as assessing RCBS's investigation and review process would require the Superior Court to "impermissibly entangle" itself with church doctrine.

The doctrine of present execution does not apply here, and neither of Defendants' merits-based arguments are compelling. Because relief would be available after judgment, it would be inappropriate for us to review the case at this time. On the merits, Defendant RCBS fails to differentiate between Weldon as corporate sole and in his personal capacity and could still be held liable under a theory of ratification, rendering the charitable immunity defense to the first set of counts unavailable. As to the second set of counts, Defendants fail to meet their burden of proof based on the facts in the Complaint for a religious autonomy defense, which is an affirmative defense and not an issue of subject matter jurisdiction.

I. Whether the doctrine of present execution enables Defendants to appeal the denial of their motion to dismiss ahead of final judgment.

To appeal the denial of a motion to dismiss under the doctrine of present execution, appellants must meet two requirements: first, they must show the impact of the interlocutory order "cannot be remedied on appeal from a final judgement;" and second, they must prove the "order is collateral to the underlying dispute in the case." See Patel v. Martin, 481 Mass. 29, 32 (2018). RCBS Br. 18. Here, Defendants claim that the impact of the order denying their motion to dismiss cannot be remedied on appeal from final judgment because if they are forced to litigate through final judgment, they will irremediably lose the benefit of the complete immunity from suit that is the basis of their argument for dismissal. See Lynch, 483 Mass. at 634. RCBS Br. 19. Comparing

their discussion of charitable immunity and lack of subject matter jurisdiction under the religious autonomy doctrine to this court's discussion in Fabre v. Walton, 436 Mass. 517, 520-521 (2002), of the absolute privilege provided by G. L. c. 231, §59H (the "anti-SLAPP" statute), Defendants argue that the protections afforded by complete shields from suit are lost if the claiming party is required to wait to appeal until after final judgment. RCBS Br. 20-21.

Plaintiff argues that Defendants' reliance on the doctrine of present executive is misplaced, highlighting that Defendants fail to raise any cases where such reliance has been validated as to claims of charitable immunity or immunity under the religious autonomy doctrine. Doe Br. 16. Plaintiff further asserts that charitable immunity and immunity under the religious autonomy doctrine encompass an immunity from liability, not from suit, and that immunity from liability can be remedied on appeal from final judgment. See Brum v. Dartmouth, 428 Mass. 684, 688 (1999), Barrett v. Brooks Hospital, Inc., 338 Mass. 754, 756 (1959), and DeWeese-Boyd v. Gordon College, 487 Mass. 31, 43 (2021). Doe Br. 17. He maintains that Defendants' reliance on Lynch is therefore inapposite, as Lynch involved statutory qualified immunity from suit, not immunity from liability. See Lynch, 482 Mass. at 640. Doe Br. 18.

Here, the rejection of Defendants' claims of immunity could be remedied (if erroneous) by appeal after final judgment because that immunity consists of immunity from liability, not immunity from suit. See Brum v. Dartmouth, 428 Mass. 684, 688 (1999). Common law charitable immunity provides immunity only from liability, not from suit. See McDonald v. Massachusetts General Hospital, 120 Mass. 432, 436 (1876). Defendants' reliance on Lynch is inapposite, as our analysis in Lynch centered on reading statutory grants of charitable immunity to provide immunity from suit if indicated by the legislative history, even if the statutory text discussed only immunity from liability. See Lynch, 483 Mass at 634-635. Here, where the source of charitable immunity

is common law and not statute, we would have no similar basis for reading the grant of charitable immunity to provide immunity from suit.[4] Thus, any immunity RCBS might have based on charitable status would be immunity from liability remediable by appeal after final judgment.

Addressing the second prong of the present execution analysis, Plaintiff contends that Defendants' charitable immunity and religious autonomy claims are not collateral to the underlying dispute in this case. Plaintiff asserts that issues are not collateral if they are "intertwined with the [party's] underlying claim," whereas collateral issues are those that will not be at issue in the trial. See Wilbur v. Tunnell, 98 Mass. App. Ct. 19, 21 (2020) and Landry v. Massachusetts Port Authority, 89 Mass. App. Ct. 307, 310 (2016). Doe Br. 19. Citing to the Superior Court's decision, Plaintiff contends that the charitable immunity claim is not collateral because he views RCBS's status as a charitable institution as directly tied to the merits issues of the tort claims in the first set of counts. See Barrett, 338 Mass. at 756. Doe Br. 20. Plaintiff asserts that the same is true of Defendant's religious autonomy claim, stating that the validity of such a claim is "a fact-based determination that must be considered at trial." See Murphy v. I.S.K. Con. of New England, Inc., 409 Mass. 842, 849-857 (1991). Doe Br. 20.

Defendants respond that Plaintiff's definition of "collateral issues" is overly broad, and that the second prong of present execution analysis includes any issues that "can be reviewed independently of any consideration of the merits of the underlying case." See Lynch, 483 Mass. 631. RCBS R. Br. 4. They argue that their claims of immunity and lack of subject matter jurisdiction can be addressed apart from the underlying claims. Id. The issues surrounding their claimed immunity, they assert, do not rely on the details of the tort claims themselves. Id. They

[4] Defendants' basis for charitable immunity relies on the doctrine at common law before the legislature enacted G. L. c. 231, § 85K in 1971. See Ricker v. Northeastern University, 361 Mass. 169, 172 (1972). Section 85K abrogated much of the common law doctrine, but we held in Ricker that the abrogation was prospective in effect only. Id.

further argue that Plaintiff's discussion of Hamm is inapposite, as that case was resolved on *res judicata* grounds, not on subject matter jurisdiction. Id.

Defendants' charitable immunity claim is likely collateral to the underlying dispute in this case. "An issue is collateral to the underlying dispute if it is one that will not have to be considered at trial." Maddocks v. Ricker, 403 Mass. 592, 596 (1988). Defendants' ability to invoke charitable immunity relies not on the details of the tort claims themselves, but instead solely on if the tortious, non-charitable actions alleged in those claims actually occurred. See Keene v. Brigham and Women's Hosp., Inc., 439 Mass. 223, 239-240 (2003) (recognizing that "at common law, the protection of charitable immunity only extended to negligence committed in the course of activities carried on to accomplish charitable activities"). Because the parties ultimately agree that the alleged tortious conduct at the heart of the first set of claims occurred, the issue will not have to be considered at trial. Defendants' claim of immunity under the religious autonomy doctrine is also likely collateral to Plaintiff's second set of underlying claims. While both the underlying tort claims and the claim of immunity require considering the details of the church's review process, the inquiries differ in substance. Evaluating Plaintiff's tort claims requires determining if the alleged deficiencies in the process can substantiate the alleged tort claims. In contrast, Defendants' immunity claim requires determining whether the review process is so entangled with church doctrine so as to preclude review under the First Amendment. Because the purpose of these inquiries differs and evaluating the tort claims will not require a consideration of the review process's religious nature, Defendants' religious autonomy defense is likely collateral to the underlying dispute.

However, based on the availability of relief after final judgement, we should not review the merits of this interlocutory appeal pursuant to the doctrine of present execution, despite the issues being collateral.

[…]

CONCLUSION

We should DISMISS the appeal. The doctrine of present execution does not apply where, as in this case, relief is available after final judgment. If this court disagrees, we should AFFIRM on the merits, as neither charitable immunity nor religious autonomy provide a suitable basis for a motion to dismiss.

Applicant Details

First Name	**Samuel**
Middle Initial	**A**
Last Name	**Goodstein**
Citizenship Status	**U. S. Citizen**
Email Address	**Sam.goodstein2@gmail.com**
Address	**Address** Street **29 Charles Street** City **New York** State/Territory **New York** Zip **10014** Country **United States**
Contact Phone Number	**9087872994**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**May 2016**
JD/LLB From	**Brooklyn Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23302&yr=2009**
Date of JD/LLB	**May 17, 2019**
Class Rank	**30%**
Law Review/ Journal	**Yes**
Journal(s)	**Brooklyn Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court Honor Society - Trial Division**

Bar Admission

Admission(s) **New York**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Gershuny, Hon. Jeffrey
jgershun@nycourts.gov
Hall-Swartz, Victoria
vhallswartz@gmail.com
3479240274
Hanophy, Robert
RJHanophy@queensda.org
(718) 286-7014

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SAMUEL A. GOODSTEIN

29 Charles Street, Apt. 3B, New York, NY 10014 • (908) 787-2994 • sam.goodstein2@gmail.com

April 26, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a 2025 – 2026 clerkship with your chambers. I am a 2019 graduate of Brooklyn Law School, and I currently serve as a felony Assistant District Attorney in the Queens County District Attorney's Office.

While previously practicing as an associate with Fox Rothschild in the midst of a global pandemic, and most recently serving as an ADA with the Queens DA's Office immediately following bail and discovery reform, I've encountered a cacophony of challenging legal issues over the last several years. But, contrary to what one might initially expect, the most thought-provoking, intellectually invigorating endeavors of my professional life took place before I was sworn into the bar.

As an aspiring attorney, I had the good fortune to serve as a judicial intern with the Honorable Regina Caulfield of Union County Superior Court in New Jersey and the Honorable Vincent Papalia of the United States Bankruptcy Court for the District of New Jersey. Working alongside law clerks and court staff, I was tasked with drafting bench memoranda about nuanced legal issues and assisting with judicial proceedings. I embraced every opportunity to learn from time-tested legal minds on both sides of the bar as well as the bench. Each case before the court not only provided me with a unique opportunity to develop an understanding about a discrete area of the law, but also equipped me with the knowledge to grasp the reasoning behind the judge's decision-making processes in future cases. And while the in-court experiences heightened my desire to one day practice as a litigator, it was the teaching moments and intellectual breakthroughs one-on-one with the judges that made up the most defining moments from my time in chambers.

Now, as a practicing attorney, it is my sincere hope that I can serve alongside Your Honor as your law clerk and carry the many lessons I have learned through my previous experiences into your chambers.

Included please find my resume, law school transcript, writing sample, and letters of recommendation from the Honorable Jeffrey Gershuny, Bureau Chief Robert Hanophy, and Supervisor Victoria Hall-Swartz for your review. I hope to have the opportunity to interview with you, and I appreciate your consideration of my application.

Respectfully,

Samuel A. Goodstein

SAMUEL A. GOODSTEIN

29 Charles Street, Apt 3B, New York, NY 10014 • (908) 787-2994 • sam.goodstein2@gmail.com

EDUCATION

Brooklyn Law School, Brooklyn, NY
Juris Doctor, May 2019
Honors: *Brooklyn Law Review*, Moot Court Honor Society, Trade Secrets Institute Fellowship

James Madison University, Harrisonburg, VA
Bachelor of Science, May 2016
Major: Justice Studies / Minor: Conflict Analysis and Intervention
Honors: Dean's List (3 semesters)

EXPERIENCE

Queens County District Attorney's Office, Kew Gardens, NY
Assistant District Attorney April 2021 – Present

- Recipient of the District Attorney's 2022 Rookie of the Year Award;
- Member of Felony Trial Bureau II, and former member of the Criminal Court and Intake Bureaus;
- Conduct jury trials, suppression hearings, and grand jury presentments;
- Investigate cases by utilizing proffer sessions, warrants, and cooperating witnesses; and
- Supervise junior ADAs during hearings and appearances, draft accusatory instruments and motion responses, interview crime victims and law enforcement officers, and negotiate dispositions for felony and misdemeanor cases.

Fox Rothschild LLP, New York, NY
Associate September 2019 – December 2020
Summer Associate June 2018 – August 2018

- Lead associate for firm response to litigation stemming from pandemic-related rent abatement and lease termination requests;
  - Researched the application of *force majeure* provisions in commercial leases to the COVID-19 pandemic;
  - Advised partners and associates firmwide about permissible client conduct and potential risks/rewards of litigation;
  - Collaborated with and coordinated the efforts of attorneys in 12 Fox offices for jurisdiction-specific analysis.
- Co-lead on *pro bono* Special Immigrant Juvenile Status litigation matter;
  - Researched and analyzed case law based on jurisdictional treatment of an adolescent seeking Special Immigrant Juvenile Status, drafted motion for waiver of service of process and affidavit, and prepared client for status hearing.
- Supported lease agreement negotiations and conducted due diligence for a range of clients, including a Fortune 500 company.

Brooklyn Law School Mediation Clinic – Small Claims Court, New York, NY January 2019 – May 2019
Certified Mediator

- Provided mediation services to parties engaged in disputes and facilitated settlement discussions; and
- Managed conflicting viewpoints and crafted novel proposals to achieve expedient, cost-effective resolutions.

The Honorable Vincent F. Papalia, U.S.B.J., Newark, NJ June 2017 – August 2017
Judicial Intern

- Reviewed pleadings and drafted bench memoranda summarizing legal and factual points of contention; and
- Observed proceedings and conferences concerning both adversarial and non-contested matters.

The Honorable Regina C. Caulfield, J.S.C., Elizabeth, NJ June 2016 – August 2016
Judicial Intern

- Researched issues pertaining to fraud, line-up identification, and mistrials;
- Assisted law clerks in the preparation of bench memoranda; and
- Observed two felony trials and multiple suppression hearings.

PUBLICATION

- *Applying Frustration of Purpose to NY Commercial Leases - Expert Analysis*, Law360 (June 18, 2020), law360.com/articles/1283779
  - Co-authored with Fox Rothschild Litigation partner Matthew Schenker; and
  - Featured among the "Hottest Firms and Stories on Law360."

BAR ADMISSION

- New York State Bar; United States District Court, E.D.N.Y.

Samuel Goodstein
Brooklyn Law School
Cumulative GPA: 3.522

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Fundamentals of Law Practice	C. Arnold	B+	2	
Torts	A. Twerski	B+	4	
Criminal Law	N. Cohen	B+	3	
Civil Procedure	M. Fullerton	A	5	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	W. Taylor	B	5	
Property	C. Beauchamp	B+	4	
Fundamentals of Legal Writing 2	C. Arnold	B+	2	
Constitutional Law	A. Napolitano	A	5	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	L. Griffin	B	4	
Trial Advocacy	L. Jacobs	A-	2	
Interviewing & Counseling	G. Schultze	A-	2	
Moot Court Competitions	S. Caplow	P	1	P = Pass
Brooklyn Law Review	B. Jones-Woodin	P	2	P = Pass
Corporations	D. Brakman Reiser	A-	4	

Winter 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Boot Camp	M. Gerber	P	1	P = Pass

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court Competitions	S. Caplow	P	1	P = Pass
Entertainment Law	V. Brown	B+	2	
Negotiations Seminar	G. Schultze	A-	2	
Federal Criminal Investigations	N. Ross	A	2	
Brooklyn Law Review	B. Jones-Woodin	P	1	P = Pass

Criminal Procedure: Investigations	A. Ristroph	P	3	P = Pass
Trade Secrets Law and Practice	S. Kayman	A-	2	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court Competitions	S. Caplow	P	1	P = Pass
Securities Regulation	J. Fanto	A-	3	
Brooklyn Law Review	B. Jones-Woodin	P	1	P = Pass
Discovery Workshop	T. Driscoll	A-	2	Highest Grade in the Class
Introduction to IP	B. Lee	A-	3	
Internet Law	C. Mulligan	A-	3	
Professional Responsibility	M. Ross	B	2	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Clinic - Mediation Seminar	H. Anolik	A-	3	
Federal Income Taxation	Y. Givati	AU	0	AU = Audit
Clinic - Mediation	H. Anolik	P	2	P = Pass
Brooklyn Law Review	B. Jones-Woodin	P	1	P = Pass
Corporate & White Collar Crime	M. Baer	B+	3	
Pre-Bar Review II	F. Midwood	P	2	P = Pass

Grading System Description
Brooklyn Law School Transcript

CRIMINAL COURT OF THE CITY OF NEW YORK
125-01 QUEENS BOULEVARD
KEW GARDENS, NY 11415

CHAMBERS OF
HON. JEFFREY A. GERSHUNY

April 17, 2023

To whom it may concern:

I am writing in full support of Assistant District Attorney Sam Goodstein's application for a clerkship in your chambers. Over the past year, Sam has appeared before me for a variety of reasons and assignments including arraignments, all-purpose calendar parts, case conferences, hearings, and a jury trial that went to verdict.

Each time Sam appears in my courtroom, he demonstrates his knowledge of the law by routinely making precise arguments, providing numerous citations to support his arguments, as well as demonstrating his utmost preparation and understanding of pertinent legal issues. Sam is by far an exemplary professional, always prepared with his cases, diligent in his filings and courteous to the public, court staff and opposing counsels. Sam is without question top 1% of all ADAs who have appeared before me in Criminal Court based on his maturity, experience, extensive knowledge of the law and work ethic. He surpasses his peers in almost every facet of the profession.

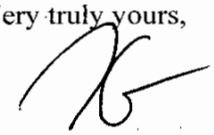
In early September of 2022, I had an opportunity to preside over ADA Goodstein's Driving While Intoxicated trial, which involved a variety of complicated issues. During the trial, Sam exceeded expectations through his poise, attention to detail, and his command of the courtroom from jury selection to summations. Sam made cogent arguments and thoughtful objections and clearly showed his abilities to be an effective prosecutor and litigator. I was particularly impressed with his closing arguments and informed his supervisor after the trial that Sam's summation was the gold standard for his colleagues to follow.

As a former law clerk myself with 15 years of experience at the state level, prior to becoming a judge, I fully understand the needs of the position and what a judge looks for with

regard to the quality and depth of the legal research, analysis and writing expected of a law clerk. Sam Goodstein, without hesitation, is a must select for a law clerk position given all of his profound qualities. I know he will be an asset to your chambers, and I take great pride in recommending him for a clerkship.

Please do not hesitate to reach out if you have any questions about ADA Goodstein's qualifications or my recommendation.

Very truly yours,



Hon. Jeffrey Gershuny
NYC Criminal Court Judge
County of Queens

QUEENS COUNTY DISTRICT ATTORNEY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415-1568

718.286.6000
WWW.QUEENSDA.ORG

MELINDA KATZ
DISTRICT ATTORNEY

April 29, 2023

To Whom It May Concern:

It is my great privilege to recommend Samuel Goodstein for a clerkship in your chambers. I've had the true honor to supervise Samuel Goodstein in the beginning of his career as an Assistant District Attorney, ranging from victim interviews, investigations, conferences, and trial. After assisting with Sam's development as an ADA for more than a year, I can attest to both his work ethic and his character. I am now proud to not only call him a colleague, but also a friend.

Throughout my time supervising Sam, he has displayed many characteristics that have made him a great leader, and would make him an excellent clerk. For example, his first-rate organizational skills allowed him to always stay on top of new assignments and handle more than 130 cases at a time with ease. Additionally, during Sam's time in the Criminal Court Bureau at the Queens District Attorney's Office, Sam has proven to be hard-working, dedicated, inquisitive, and eager. On multiple occasions Sam was placed in a leadership role to his fellow colleagues. Whether his role involved supervising hearings, or being tasked with assisting in a colleague's trial, he always stepped up to the plate.

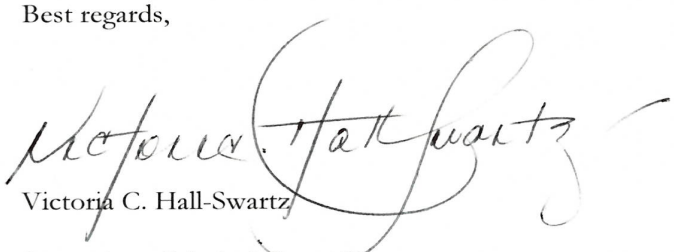
He endlessly demonstrated his dedication and eagerness with his continuous investigation on the law, his impeccable research on new case law, his demanding demeanor in court, and finally, his

devotion to assisting his colleagues. He thrives in being prepared, detail-orientated, and professional both inside and outside of the courtroom. demonstrating that he possesses certain qualities that are necessary as a clerk. It has been an honor to see him develop as an Assistant District Attorney.

Sam continues to be one of the most reliable Assistant District Attorney's I've had the honor and pleasure of working with, and I know he will be a great asset to you in your chambers.

If you need any further assistance or any more information, please do not hesitate to reach out to me. Thank you for your consideration.

Best regards,



Victoria C. Hall-Swartz

Supervisor, Criminal ~~Court~~ Bureau

Queens District Attorney's Office

MELINDA KATZ
DISTRICT ATTORNEY

DISTRICT ATTORNEY QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415-1568
(718) 286-6000

Personal and Unofficial

April 26, 2023

To Whom it May Concern:

I am writing to recommend one of my colleagues for a judicial clerkship position in your chambers. I have known Samuel Goodstein since the Spring of 2021, when he began his employment here at the Queens County District Attorney's Office in New York City.

I have been a practicing attorney for 33 years and as Chief of the Criminal Court Bureau, I was Mr. Goodstein's Supervisor, as he began his legal career as an Assistant District Attorney. Sam immediately stood out from his fellow class members due to his infectious personality, sense of humor and legal acuity. Sam is a young attorney, but he is composed and mature beyond his years, which is demonstrated in his patience and overall professionalism. Because of Sam's stellar performance in the Bureau, I recommended him for recognition to District Attorney Melinda Katz and am happy to note that last year, DA Katz awarded him our, "Rookie of the Year" award for being the most promising member of our 2021 hiring class of over 60 attorneys. I always felt comfortable depending on Sam. He is a "go to" Assistant who could handle the most difficult cases in the Bureau. I know that Sam would be a great asset to you and that he can be trusted personally and professionally to deal with the most complex fact patterns and litigation decisions/research in your court.

I would of course make myself available, should you like to speak to me personally. Please feel free to call or have your staff call me at (718) 286-7014. I look forward to the opportunity to speak further about Mr. Goodstein.

Sincerely,

Robert J. Hanophy Jr.

_____

Robert J. Hanophy Jr.
Assistant District Attorney
Chief, Criminal Court Bureau
RJHanophy@Queensda.org

SAMUEL A. GOODSTEIN

29 Charles Street, Apt 3B, New York, NY 10014 • (908) 787-2994 • sam.goodstein2@gmail.com

WRITING SAMPLE

Beginning in early 2021, the Queens County District Attorney's Office began receiving motions pertaining to a newly promulgated statutory amendment. Defendants moved the court to dismiss accusatory instruments due the People's failure to certify compliance with C.P.L. § 100.15 and § 100.40 as contemplated under C.P.L. 30.30 § (5-a), a statute that went into effect on January 1, 2020. Simply put, the People neglected to fulfill a procedural certification requirement and, as a result, defendants argued that their cases should be dismissed. Several Queens County courts agreed, despite the People's substantive compliance with all underlying statutory requirements, and effectively terminated hundreds, if not thousands of cases by invalidating the statements of readiness and dismissing the People's accusatory instruments.

In an effort to assist the Appeals Bureau within the District Attorney's Office, I wrote this brief in response to the mounting litigation over the discrete issue. This writing sample is an unedited, redacted portion of a People's Appeal written to the Appellate Term disputing the lower court's ruling invalidating the People's statement of readiness and dismissing the accusatory instrument.

To preserve confidentiality, I have removed all names and case identifiers from this brief. I have also removed most non-substantive components, and redacted certain portions, as indicated in brackets in the text. This writing sample has been written solely by me and has not been edited by others.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM: 2nd, 11th, & 13th JUDICIAL DISTRICTS

----------x

THE PEOPLE OF THE STATE OF NEW YORK, :

Appellant, :

-against- :

[DEFENDANT], :

Defendant-Respondent :

----------x

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The People appeal from a June 10, 2021, order of the Criminal Court, Queens County (Dunn, J.). By that order, and relying on Criminal Procedure Law § 30.30, the court invalidated the People's statement of readiness and dismissed the accusatory instrument because the People did not precede or accompany the statement of readiness with a certification ensuring that the accusatory instrument was facially sufficient and that it contained exclusively non-hearsay allegations as contemplated within Criminal Procedure Law § 100.15 and § 100.40, respectively.

FACTUAL AND LEGAL BACKGROUND

On January 20, 2020, defendant was charged, by misdemeanor complaint, with one count of Forcible Touching (Penal Law § 130.52 (1)) and one count of Sexual Abuse in the Second Degree (Penal Law § 130.55) under Queens County

Docket Number CR-XXXXXX-2XQN. Eleven days later, the People filed a supporting deposition with the court, thereby removing all hearsay allegations and converting the accusatory instrument into an information containing only triable counts. Then, on March 16, 2020, the People filed a Certificate of Discovery Compliance pursuant to C.P.L § 245.20 and announced trial readiness on all counts.

Over 450 days later, on June 10, 2021, defendant filed a motion to dismiss the accusatory instrument, citing C.P.L. 30.30 (1) (b). Defendant argued that the People did not certify under C.P.L. 30.30 (5-a) that the accusatory instrument was facially sufficient under C.P.L. 100.15 and that the instrument was fully converted to an information under C.P.L. 100.40 when the statement of readiness was filed or within ninety days of the commencement of the criminal action (Defendant's Motion at 3-4). Therefore, defendant argues, the People were not actually ready for trial and the accusatory instrument should be dismissed (Defendant's Motion at 4).[1]

The People responded to defendant's motion by first addressing what defendant did not contest. Specifically, the People argue that defendant did not dispute the facial sufficiency of the accusatory instrument or allege that any count was unconverted (People's Reply at 2). Next, the People argue that C.P.L. 30.30 (5-a) does not bind the prosecutor to "certify" compliance with C.P.L. 100.15 and 100.40 prior to or at the same time as an announcement of readiness given the absence of temporal language in the provision (People's Reply at 2). Further, the People emphasized the legislative purpose and public policy implications of the

[1] Pursuant to C.P.L.30.30 (1) (b), at least one of the offenses charged must be a misdemeanor punishable by a sentence of imprisonment of more than three months and none of the offenses can be a felony.

statutory amendments enacted in January 2020 and highlighted the difference between the elimination of "partial readiness" and a strictly procedural certification requirement (People's Reply at 3).[2]

Following submissions by defendant and the People, on August 11, 2021, the lower court issued a decision finding in favor of defendant. The court reasoned that the People's failure to certify compliance with C.P.L. 100.15 and 100.40 as contemplated in C.P.L. 30.30 (5-a), despite uncontested, strict adherence to each substantive statutory requirements, was a fatal error that rendered the statement of readiness invalid *nunc pro tunc* (Court's Decision at 4-7). Because the original statement of readiness was invalid at the time of filing, the time that elapsed from commencement of the criminal action until motion practice began was chargeable to the People and extended beyond the statutorily mandated ninety-day window (Court's Decision at 6-7). In rejecting the People's temporal argument, the court stated that the plain language of C.P.L. 30.30 (5-a) made certification of compliance with C.P.L. 100.15 and 100.40 a condition precedent to announcing trial readiness (Court's Decision at 7). The court did not address any additional arguments raised by the People.[3]

In sum, the court determined that the time chargeable to the People, minus excludable time, totaled 263 days–far exceeding the ninety-day period permitted

[2] Should the court have agreed with the People's argument, fifty-six days would have been charged.
[3] In dismissing the accusatory instrument, the court did not provide the People an opportunity to cure. Additionally, the court did not provide an explanation for preventing the People from taking curative action.

contemplated under C.P.L. 30.30 (1) (b)–and dismissed the accusatory instrument (Court's Decision at 7). The People now appeal.

ARGUMENT

I. THE COURT BELOW IMPROPERLY DISMISSED THE ACCUSATORY INSTRUMENT

This appeal is about equal treatment and proportionality. First, the language included within C.P.L. 30.30 (5-a) does not limit the prosecution's time to file an accusatory instrument certification. Rather, it only states that the statement of readiness will not be valid "unless" an accusatory instrument is filed. Second, the lower court fails to follow explicit guidance from courts of coordinate and superior jurisdictions when interpreting the language of C.P.L. 30.30 (5-a). Instead, it defaults to dismissal of the People's accusatory instrument without permitting an opportunity to cure. Finally, the lower court ignores legislative intent and public policy implications of its ruling, ultimately favoring swift dismissal of significant charges over a measured pathway to a just, equitable outcome.

A. There is No Valid Basis for Requiring the C.P.L. § 30.30 (5-a) Certification to be Filed Within Ninety Days of the Commencement of a Criminal Action

The lower court held that the People's statement of trial readiness was invalid because they failed to certify that the filing was completed in accordance with Criminal Procedure Law § 100.15 and 100.40 within ninety days of the commencement of a criminal action, minus excludable time. That is not the law.

The passage and implementation of C.P.L. 30.30 (5-a) has created new obligations for the prosecution. Pursuant to the novel statutory requirements, a

failure by the People to comply with C.P.L. 100.15 and 100.40 would be a significant, material departure from prosecutorial pre-trial obligations and would hinder a valid announcement of trial readiness. In particular, it is undisputed that an impediment to readiness worthy of dismissal exists where a misdemeanor complaint is not properly converted to an information due to facial insufficiency. However, there is no allegation of such impediment in the instant appeal. Rather, the focus revolves around a boilerplate certification, immaterial to the accusatory instrument itself, that was not filed within ninety days of the commencement of the criminal action. That temporal requirement, upon which the lower court uses to justify dismissal of the accusatory instrument, is wholly absent from the statute.

The trial court incorrectly required the People to submit the accusatory instrument certification within ninety days of commencement of the case, minus excludable time.[4] The presence of the language "accompanied or preceded by" within C.P.L. 30.30 (5) unquestionably provides temporal instruction. And, by its proximity, the absence of such language in C.P.L. 30.30 (5-a), the immediately succeeding section, provides an even clearer indication of legislative intent. In *People v. Tychanski*, a case interpreting C.P.L. 30.30 (5) pre-2020 reforms, the Court held that "the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended." *Tychanski*, 78 N.Y.2d 909, 911-12 (1991). The *Tychanski* court stated categorically that legislative guidance in one matter and silence in another analogous matter should be deemed intentional

[4] *See* C.P.L. 30.30 (4) (a)

and given substantial weight.[5] *See id.* Despite the breadcrumbs laid down by the *Tychanski* court, the court below still failed to find the correct path. Instead, it incorrectly inextricably intertwined the speedy trial demands under C.P.L. 30.30 (1) (b) with the filing of the accusatory instrument certification under C.P.L. 30.30 (5-a) and manufactured a deadline that was not contemplated by the Legislature.[6] The lower court's failure to account for the discrepancy between C.P.L. 30.30 (5) and C.P.L. 30.30 (5-a) resulted in a fabricated requirement being levied upon the prosecution.

The New York Court of Appeals has weighed in on similar statutory construction. The Court of Appeals has made clear that the lower courts "may not create a limitation that the Legislature did not intend to enact" because the Legislature, when drafting and passing the amendment, could have included similar–or even identical–language if intended to convey a similar or identical objective. *Theroux v. Reilly*, 1 N.Y.3d 232, 240 (2003) (opining that if the Legislature intended a restriction on employee eligibility it would have included language in the statute); *see also People v. Francis*, 30 N.Y.3d 737, 748 (2018) (interpreting the Legislature's intent to permit a full spectrum of conduct to be considered by an assessment board based on explicit inclusion of a non-exhaustive list in the statute); *see also United States v. Pristell*, 941 F.3d 44 (2d Cir. 2019) ("The presence of a phrase applicable to one factor makes clear that the phrase's omission elsewhere

[5] Notably, judicial interpretation of the presence of, or absence of, statutory language was not altered by the 2020 reforms.
[6] *See People v. Mueller*, 23 N.Y. Slip Op 50168(U) (March 9, 2023) (citing William C. Donnino, Supp. Practice Commentary, § 30.30 "Criminal Procedure Law § 30.30 (5-a) was 'designed to abrogate decisional law that authorized the prosecution to answer "ready for trial" on an information that was only facially sufficient as to some of the charges.'")

was deliberate."). Following guidance from the Court of Appeals, it is plain that "[w]here a statute describes the particular situations in which it is to apply and no qualifying exception is added, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" *People v. Anonymous*, 34 N.Y. 3d 631, 641 (2020) (quoting *Matter of Alonzo M.*, 72 N.Y.2d 662, 665-66 (1988)); *see also People v. Jackson*, 87 N.Y.2d 782, 788 (1996) (noting that the "Legislature's failure to specify dismissal as the proper remedy… is significant" and it would have been included if dismissal was intended to be an option for consideration). Despite numerous requirements placed on the prosecution, absent from any provision within C.P.L. 30.30–neither in earlier constructions of the statute nor in post-2020 statutory amendments–is the requirement that the accusatory instrument certification accompany or precede a statement of trial readiness. And while the Court of Appeals commands that the presence of a phrase in one provision coupled with the absence of a similar phrase in another must not be overlooked or cast aside as immaterial; the lower court did just that. It impermissibly sidestepped its obligation to afford appropriate weight to the presence of temporal language in C.P.L. 30.30 (5) and the absence of similar language in C.P.L. 30.30 (5-a). By ignoring explicit instruction from the Court of Appeals, the lower court reached an incorrect conclusion and, ultimately, an unjust result.

It is plain that the language of C.P.L. 30.30 (5-a) does not impose a time constraint on the People's accusatory instrument certification filing. Several courts

of coordinate jurisdiction have rejected the assertion that the People must certify complete conversion and facial sufficiency of the accusatory instrument before or alongside the announcement of readiness to comply with the statute. *People v. Aviles*, 72 Mis.3d 423 (Crim. Ct. Kings Co. 2021) (explaining that there is a clear distinction between the temporal requirements under C.P.L. § 30.30 (5) and the absence of such requirement under C.P.L. § 30.30 (5-a)); *People v. Plaza*, 72 Misc.3d 888 (Crim. Ct. N.Y. Co. 2021) (holding that although prior or simultaneous certification would be best practice, "the People's failure to do so… is not fatal"); *People v. Lewis*, 72 Misc.3d 686 (Crim. Ct. Kings Co. 2021) (finding that a subsequent pre-trial filing of the accusatory instrument certification is permissible to validate the original statement of readiness); *People v. Kupferman*, 2021 N.Y. Misc. LEXIS 3511, 2021 N.Y. Slip Op 50550 (U), 2021 WL 2448239 (Crim. Ct. Kings Co. 2021), discussing *Lewis* and *Aviles*; Cf., *People v. Paez*, NYLJ, May 10, 2021 at p. 17, col.1, 2021 NYLJ LEXIS 405 (Crim. Ct. Kings Co. May 4, 2021). In the instant case, a fabricated requirement was levied upon the People and they were not provided any opportunity to file the certification post-readiness announcement. In applying the law, several jurisdictionally equivalent courts concur with the position that the People are not obligated to submit an accusatory instrument certification preceding or accompanying the filing of a statement of readiness.

Even when courts have held that dismissal of the accusatory instrument is warranted for failure to certify compliance under C.P.L. 30.30 (5-a), the temporal language discrepancy is absent from consideration. *See People v. Ramirez-Correa*,

71 Misc.3d 570 (Crim. Ct. Queens Co. 2021); *see also People v. Hernandez*, 2022 N.Y. Slip Op 22129 (Crim. Ct. Queens Co. 2022) (highlighting the connectivity between adjacent sections C.P.L. 30.30 (5) and C.P.L. 30.30 (5-a)). At most, the *Hernandez* court reasoned that C.P.L. 30.30 (5-a) cannot be read without considering C.P.L. 30.30 (5). *Id.* at 3. And that is exactly the prosecution's position. It is undisputed that the provisions must be read together; one follows the other and both were included in the same legislation. However, when the provisions are read together, just as the *Hernandez* court insisted, the discrepancies are underscored–not imported from one provision to the other. Additionally, the court must not "resort to forced or unnatural interpretations" in discerning a statute's plain meaning. *Castro v. United Container Mach. Group, Inc.*, 96 N.Y.2d 398, 401 (citing McKinney's Cons Law of NY, Book 1, Statutes § 232). Here, however, the lower court forced the temporal aspect of C.P.L. 30.30 (5) into the reading of C.P.L. 30.30 (5-a). Ultimately, courts that import a temporal requirement on the filing of the accusatory instrument certification failed to adequately consider statutory disparities and applied unnatural interpretations to the statute in question.

It is unquestionably improper to import the temporal requirements from one section to its adjacent section as each serves a very different purpose. In the instant matter, the bordering sections target two separate and distinct issues: discovery compliance and accusatory instrument compliance. Without the requirements under C.P.L. 30.30 (5), mainly the filing of a certificate of discovery compliance alongside or before stating ready for trial, the defendant would be required to undertake an

arduous exploratory expedition every time the People stated ready. Even the most meticulous defendant would be ill prepared to pinpoint all efforts made by the prosecution to obtain discoverable materials from outside agencies under prosecutorial control or uncover all outstanding discovery. The defendant's search would prove fruitless because the prosecutor–and only the prosecutor–holds the information necessary to determine whether good faith efforts were made in obtaining materials and sharing required discovery. For that reason, a certification of discovery compliance is unique to C.P.L. 30.30 (5) and serves as a necessary affirmation in the People's disclosure process.

Whereas the C.P.L. 30.30 (5) certification is necessary to facilitate information sharing, the C.P.L. 30.30 (5-a) certification does not further transparency or unearth information otherwise obscured from the defendant's view. The fulfillment of requirements under both C.P.L. 100.15 and 100.40, the sections that make up the foundation of C.P.L. 30.30 (5-a), are unmistakable.[7] Specifically, the information necessary to make an appropriate determination about statutory compliance pursuant to each section can be gleaned from the misdemeanor information and any supporting depositions shared with the defendant and the court. In stark contrast to the covert materials referenced in C.P.L. 30.30 (5), the overt information that provides the groundwork for C.P.L. 30.30 (5-a) is evident on the face of the shared documents. As such, the accusatory instrument certification

[7] The above-referenced obligations include: 1) facial sufficiency of the accusatory instrument, and 2) using non-hearsay allegations to establish reasonable cause to believe that the defendant committed the crimes alleged in the instrument. (*See* C.P.L. 100.15 and 100.40).

serves a far different, less significant purpose when compared to the discovery certification, and should be treated differently by the court.

Given the overall insignificance of the information contained within, the presence or absence of the accusatory instrument certification should be paid little weight. Further to the point, it is the court–not the prosecutor–that determines whether the People have met the requirements of facial sufficiency of the accusatory instrument. The prosecutor can, at most, "certify in good faith that it is their belief that each count of the accusatory instrument meets the requirements of C.P.L. 100.15 and 100.40." *People v. Councel*, CR-021624-20KN, N.Y. Slip Op 22394 (Crim. Ct. Kings Co. 2022). The certification itself serves as a boilerplate prosecutorial promise that overlaps with issues ultimately to be decided by the court. So, even when the prosecutor certifies compliance, the court possesses the power, acting as the ultimate arbiter, to invalidate or uphold the initial proclamation of facial sufficiency. *See, e.g.*, *People v. Bryant*, 58 Misc.3d 148(A) at *1. Although C.P.L. 30.30 (5-a) describes a need to provide an accusatory instrument certification, the timing of the prosecutor's weightless rubber stamp holds little importance in the grand scheme of the criminal action.

In sum, courts favoring dismissal disregarded the temporal language discrepancy, neglected to give the absence of statutory language in one provision and the presence of such language in an adjacent provision appropriate consideration, ignored the insignificance of the certification itself, and, ultimately, failed to take the analysis to its logical end.

B. The People Should Have Been Permitted to Undertake Alternative Curative Measures Prior to Dismissal of the Accusatory Instrument

[REMOVED – AVAILABLE UPON REQUEST]

C. The Lower Court Impermissibly Ignored Legislative Intent, Cast Aside Legislative Silence, and Disregarded Policy Implications When Dismissing the Accusatory Instrument

The Legislature did not focus on the procedural act of certification when contemplating the construction of the statutory amendments. Rather, ensuring compliance with *substantive* requirements served as the heart and soul of the newly promulgated legislation. In particular, the changes focused on eliminating the practice of partially converting accusatory instruments, providing defendants with advanced disclosure of discoverable materials, and further exploring the People's actual trial readiness. *See* William C. Donnino, Practice Commentary, McKinney's Cons of NY, Book 11A, C.P.L. § 30.30; *People v. Minor*, 144 Misc. 2d 846, 549 N.Y.S.2d 897 (App. Term, 2d Dept. 1989)). While the Legislature crafted the amendments to target these specific points of emphasis, they have instead been interpreted by the court to permit dismissal of accusatory instruments due to an inconsequential procedural omission. The statutory amendments, originally intended to be targeted and narrow in scope, have ballooned far beyond the intended results.

Just as explicit intent of the Legislature must be taken into consideration by the court, legislative silence should not fall on deaf ears. Certification-related issues are not once mentioned by the Legislature as a desired result of the statutory

amendments. Instead, the Legislature focused its attention on substantive issues while setting aside procedural matters. The silence should not only have rung loudly in the ears of the judiciary but also underscored the minuteness with which to treat alleged procedural defects. Here, a plain reading of C.P.L. 30.30 (5-a) does not include an explicit timing requirement. Even when meticulously scrutinizing the statutory language, the only temporal signal from the Legislature is that certification must take place before trial to ensure adequate readiness. Just as the presence of temporal language signals legislative intent to the court, legislative silence should be given equal consideration in the court's calculus.

In addition, the lower court failed to appreciate policy implications of its decision to dismiss the accusatory instrument without giving the People an opportunity to cure. Courts are mandated to "refrain from dismissing an otherwise defective instrument that 'may be cured by amendment and where the people move to so amend." *Aviles*, 72 Misc.3d at 428 (quoting C.P.L. § 170.35 (1-a)). Here, the "defect" requiring amendment is the absence of a facial sufficiency and conversion certification. Such certification functions as a mere formality reinforcing what is plain on the face of the instrument and accompanying supporting documentation, and yet, in the instant matter, its absence has proven fatal to the case as a whole. In stark contrast to the lower court's ruling, the *Aviles* court urges that curing a defect by permitting a certification to be filed pre-trial and post-readiness announcement "does not run afoul of the letter or intent of the law. To the contrary, it is in accord with the Court's discretionary powers to bring about the intent of the

Legislature." *Id*. For the lower court to find otherwise cuts against common judicial practice and undermines the People's unblemished compliance with all substantive statutory requirements. Further, should this Court uphold the lower court's ruling, the reverberating effects would lead to a flood of pre-trial dismissals on procedural grounds wholly unrelated to the legislative intention behind the enactment. The court has failed to consider that the unintended consequences of defaulting to a drastic outcome could have serious implications on future procedural omissions, no matter how insignificant. The likely reverberating effects of prohibiting the People from curing a negligible omission cannot be overstated and must be given adequate consideration.

Ignoring common sense alternatives leads to unjust results. It is the responsibility of the courts to apply and adapt statutory amendments in a manner that aims to "avoid 'unreasonable and absurd' applications of the law." *People v. Santi*, 3 N.Y.3d 234, 243 (2004). Dismissal of a criminal case, especially one involving forcible touching and sexual abuse allegations, on any grounds is an extreme action reserved only for the most egregious of misdeeds. Courts of coordinate jurisdiction weigh several factors such as the seriousness of the charges, the plain reading of the statute, and the interests of justice when determining the just and equitable application of the law. *See People v. Plaza*, 72 Misc.3d 888 (Crim. Ct. N.Y. Co. 2021). Here, however, the court neglects to consider any outside factors when determining that dismissal is the appropriate remedy. Instead, it makes a hasty decision to equate the absence of a boilerplate certification to an egregious

misdeed, favoring dismissal over curative action. When following the lower court's path, temporary omissions, inadvertent or otherwise, will prove fatal to even the most serious charges and leave no opportunity for remediation. The court's application of faulty reasoning and failure to consider essential factors resulted in an unjust application of the law.

In closing, even if this court were to find the lower court's statutory language, legislative intent, and public policy analyses to be sound, finding in favor of dismissal would still require turning a blind eye to substantial compliance with the foundational statutes underlying C.P.L. 30.30 (5-a) in favor of a sole negligible, procedural omission. The court dismissed notable differences among adjacent provisions, ignored legislative intent and policy implication, and, as a result, denied the People an opportunity to cure the perceived defect. Ultimately, this unsavory cocktail of errors led the court to reach a flawed, unjust conclusion.

Equal treatment and proportionality demand that the People be afforded an opportunity to file the accusatory instrument certification or, should this Court find that a valid certification must precede or accompany a statement of readiness, be permitted to promptly cure the defect and resume statutory compliance.

CONCLUSION

For the reasons set forth above, this Court should reverse the order of the lower court dismissing the accusatory instrument and find that 56 days are chargeable to the People.

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Class Rank	**School does not rank**
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Moot Court Experience	**Yes**
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Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**